*Together with No. 301, Mellon, Dir. General of Railroads, v. Kentucky.

Card 1

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 300

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF KENTUCKY

No. 301

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, APPELLANT,

vs.

COMMONWEALTH OF KENTUCKY

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

FILED AUGUST 17, 1931

(36,114, 36,115)

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APPEALS FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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[fol. 1] [Captions omitted]

IN COUNTY COURT OF WOODFORD COUNTY, KENTUCKY

Commonwealth of Kentucky, Plaintiff,
vs.
Southern Railway Company, Defendant,
And
Commonwealth of Kentucky, Plaintiff,
vs.
Southern Railway Company, etc., Defendants

Judgment—Filed September 29, 1920

Came the parties and filed stipulations and by consent these two cases are heard together and the case being submitted to the Court and the Court beind advised it is adjudged *the* the Court that the Plaintiff's Petition be dismissed and that the plaintiff take nothing thereby to all of which plaintiff excepts and prays an appeal which is granted.

A true copy:
Attest:
D. H. Gray, Clerk of Woodford County Court, by Jno. M. Gray, D. C.

[File endorsement omitted.]

In County Court of Woodford County

Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford County, Kentucky, Plaintiff,
vs.
Southern Railway Company, Defendant

Petition—Filed Mar. 8, 1920

The plaintiff, Commonwealth of Kentucky, states that Robert Hawkins is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky.

The defendant, Southern Railway Company, is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person: [fol. 2] and was at all times herein mentioned and now is a railway company having and exercising a special amd exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky, and other counties in this state as well as other states in the Union. During the year ended June 30th, 1914, said defendant operated, owned, leased, and controlled various liens of railroad in Kentucky and elsewhere; and under the Kentucky Statutes made and provided was liable for the payment of a franchise tax thereon, for the taxing year of 1915.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for the said year to file a report with the Auditor of Public Accounts before October first thereof showing the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares each; the amount of stock paid up; the par value and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; also the gross and net income or earnings received in this state and out of this state, on business done in this State, and the entire gross receipts of the corporation, company or association in this state and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made.

Said defendant, Southern Railway Company, failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant and said Southern Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of $2,128,789.00, as the true and total value of its property in this State. Said assessment became final in July 1915. A copy of said report is filed as part hereof marked No. 1.

The length of the lines of said Southern Railway Company in Kentucky within this State for said year was 152.718 miles.

[fol. 3] The Mobile & Ohio Railroad Company is a corporation duly oragnized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of $812,000.00, as the true and total value of its property in the State. Said assessment became final in June 1915. A copy of said report is filed here marked No. 2. The length of lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation duly organized under the laws of the State of Kentucky, with like powers as a common carrier. At all times mentioned herein defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of its lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of $49,200.00, as the true and total value of its property in this State. Said assessment became final in June 1915. A copy of said report is filed herewith marked No. 3. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as a common carrier, but the defendant controlled the same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of $10,450.00, as the true and total value of its proper-y in the State. Said assessment became final in June, 1915. A copy of said report is filed as part hereof marked No. 4. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles for said year.

No report was filed or assessment made in any way or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentioned operated, owned, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein above set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this State and escaping taxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to be omitted from assessment: to-wit: the franchise of the said defendant. No part of said [fol. 4] franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four subsidiary corporations, for said year was 212.148 miles; and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant in fact operated, owned, leased and controlled in this State for said years the said 212.148 miles and same were a part of its total system of railroad extending into the various States of the Union. Both in and outside of this State, said defendant for said year operated, owned, leased and controlled 9,253.52 miles of railroad: and said mileage wholly within this State amounted to 2.29% thereof. The net earnings or income of said defendant for said year were $29,093,759.00. Said net income or earnings when capitalized at 6% amount to $484,895,980.00, which last mentioned sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year. For said State there was within this State 2.29% of said whole property, or $11,104,117.00. The total value of the property of said defendant, Southern Railway Company, for said year, in this State, was $11,104,117.00; said defendant in the name of said subsidiary corporations paid taxes in Kentucky on $3,000,439.00, being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for the said year 1915, was ov value $8,103,678.00 and taxes on said sum are now just, due and unpaid.

Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to a twenty (20) per centum penalty on all state and county taxes collected in this action.

Wherefore, the plaintiff prays that the omitted portion of the franchise of the defendant as herein before set out, be assessed for taxation, for the year 1915, and certified to the Auditor of Public Accounts for collection on behalf of the State tax, and for certification and apportionment to the various collecting officers of the Counties in or through which said company operates its railroad, to-wit: Anderson, Ballard, Bell, Boyle, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley and Woodford. That relator herein be adjudged entitled to his commission of twenty (20%) per cent penalty against the defendant on the various accounts respectively due the State and each of said counties; that defendant be required to answer the interrogatories hereto annexed and further prays for his costs and all proper relief.

Pharagraph Two

The Plaintiff, Commonwealth of Kentucky, states that Robert Hawkins is the duly elected, qualified and acting [fol. 5] Sheriff of Woodford County Kentucky. The defendant, Southern Railway Company is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky, and other counties of this State as well as other States in the Union. During the year ended June 30th, 1915, said defendant operated, owned, leased and controlled various lines of railroad in Kenutcky and elsewhere; and under the Kentucky Statutes made and provided, was liable for the payment of a franchise tax thereon, for the taxing year of 1916.

Under the Kentucky Statutes, so made and provided it was the duty of said defendant for the said year to file a report with the Auditor of Public Accounts before October first thereof showing the name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price paid at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; also the gross and net income or earnings received in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere, during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made.

Said defendant, Southern Railway Company, failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of $2,128,789, as the true and total value of its property in this State. A copy of said report is filed as part hereof ma*kr*ed No. 5. The length of the lines of the Southern [fol. 6] Railway Company in Kentucky and within this State for said year was 157.038 miles.

The Mobile & Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of $1,049,012.00 as the true and total value of its property in the State. A copy of said report is here filed as marked No. 6. The length of the lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation duly organized under the laws of the State of Kentucky with like powers as a common carrier. At all times mentioned herein defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of $49,200.00, as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 7. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of $10,450.00, as the true and total value of its property in the State. A copy of said report is filed as part hereof marked No. 8. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles for said year.

No report was filed or assessment made in any way or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentioned, operated, owned, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein above set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this State and escaping taxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to be omitted from assessment, to-wit: the franchise of the said defendant. No part of [fol. 7] said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four subsidiary corporations, for said year was 216.468 miles; and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant in face owned, operated, leased and controlled in this State for said year the said 216.468 miles and same were a part of its total system of railroad extending into various States of said Union. Both in and outside of this State, said defendant for said year operated, owned, leased and controlled 9272.40 miles of railroad; and said mileage wholly within this State amounted to 2.33%. The net earnings or income of said defendant for said year were $25,817,397.00. Said net income or earnings when capitalized at 6% amount to $430,289,950, which last mentioned sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year.

For said State there was within this State 2.33% of said whole property or $10,025,755.00. The total value of the property — said defendant, Southern Railway Company, for said year, in this State was $10,025,755.00; said defendant in the name of said subsidiary corporations paid taxes in Kentucky on $3,237,451.00, being assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1916, was of value $6,788,304.00 and taxes on said sum are now just due and unpaid.

Rowert Hawkins, Sheriff of Woodford County, relator herein is entitled to a twenty (20%) per centum penalty on all state and county taxes collected in this action.

Wherefore the plaintiff prays that the omitted portion of the franchise of the defendant as herein before set out, be assessed for taxation, for the year 1916, and certified to the Auditor of Public Accounts for collection on behalf of the State, tax, and for certification and apportionment to the various collecting officers of the counties in or through which said company operates its railroad to-wit: Anderson, Ballard, Bell, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley and Woodford. That relator herein be adjudged entitled to his commission of twenty (20%) per cent penalty against the defendant on the various accounts respectively due the State and each of said counties; that defendant be required to answer the interrogatories hereto annexed and further prays for his costs and all proper relief.

Paragraph Three

The plaintiff Commonwealth of Kentucky, states that Robert Hawkins is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky. The defendant, Southern Railway Company is a corporation organized and existing under the laws of the State of Virginia with [fol. 8] power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky, and other counties of this State as well as other States of the Union. During the year ended June 30th, 1916, said defendant operated, owned, leased and controlled various lines of railroad in Kentucky and elsewhere; and under the Kentucky Statutes, made and provided, was liable for the payment of a franchise tax thereon, for the taxing year of 1917.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for the said year to file a report with the Auditor of Public Accounts before October first thereof showing the name and principal place of business of the corporation, company or association*l* the kind of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up*l* the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a *v*air voluntary sale; also the gross and net income or earnings received in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere, during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made.

Said defendant, Southern Railway Company, failed and refused to file said report, or any report.

The Southern Railway Company, in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Southern Railway Company in Kentucky has been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of $2,128,789.00, as the true and total value of its property in this State. A copy of said report is filed as part hereof marked No. 9. The length of th*is* lines of said Southern Railway Company in Kentucky within this State for said year was 160.45 miles. [fol. 9] The Mobile and Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it for its property and franchise so reported in the sum of $1,049,012.00, as the true and total value of its property in the State. A copy of said report is here filed as part hereof marked No. 10. The length of lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation duly organized under the laws of the State of Kentucky, with like powers as a common carrier. At all times mentioned herein defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of $88,800.00, as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 11. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of $10,450.00, as the — and total value of its property in the State. A copy of said report is filed as part hereof marked No. 12. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles.

No report was filed or assessment made in any way or form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said — embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentiones, operated, owned, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this State and escaping eaxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to be omitted from assessment; to-wit, the franchise of the defendant. No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of [fol. 10] said four sibsidiary corporations, for said year was 219.88 miles; and each of said miles was at all times a part of the general system of said defendant extending into the various States of the Union. Said defendant in fact owned, operated, leased and controlled in this State for said year the said 219.88 miles and same were a part of its total system of railroad extending into the various States of said Union. Both in and outside of this State said defendant for said year operated, owned, leased and controlled 9251.42 miles of railroad; and said mileage wholly within this State amounted to 2.37%. The net earning or income of said defendant for said year *were* $36,099,617.00. Said net income or earnings when capitalized at 6% amount to $601,660,280.00, which last mentioned sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year. For said State there was within this State 2.37% of said whole property, or $14,259,348.00. The total value of the property of said defendant, Southern Railway Company, for said year, in this State, was $14,259,348.00; said defendant in the name of said subsidiary corporations paid taxes in Kentucky on $3,277,051.00, being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1917, was of value $10,982,297.00 and taxes on said sum are now due and unpaid.

Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to a twenty (20%) per centum penalty on all state and county taxes collected in this action.

Wherefore, the pla-ntiff prays that the omitted portion of the franchise of the defendant as hereinbefore set out, be assessed for taxation, for the year 1917, and certified to the Auditor of Public Accounts for collection on behalf of the state tax, and for certification and apportionment to the various collectong officers of the counties in or through which said company operates its railroad, to-wit: Anderson, Ballard, Bell, Boyle, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley and Woodford. That relator herein be adjudged entitled to his commission of twenty (20%) per cent penalty against the defendant on the various accounts respectively due the State and each of said counties; that defendant be required to answer the Interrogatories here-o annexed and further prays for his costs and all proper relief.

Hazelrigg & Hazelrigg, L. M. Morris, Hobson & Hobson, W. D. Jesse, for Plaintiff.

IN COUNTY COURT OF WOODFORD COUNTY

INTERROGATORIES TO DEFENDANT—Filed March 8, 1920

I. In the statistics of Railways in the United States compiled by the Interstate Commerce Commission for the year [fol. 11] ending June 30, 1913, opposite the name of the "Southern Railway in Kentucky" are these words:

"Merged in Southern Railway Company, July 1, 1912." Is that statement true? And if so, what charge, if any, has been made since and when?

II. The defendant will answer the following interrogatoties for the year ending June 30, 1914.

1. What was the total mileage of railway lines which were operated, owned, leased and controlled by defendant; including lines controlled by the ownership of a majority of the capital stock?

2. What were the names of the railways which were owned, operated, leased and controlled by defendant? Give the length of each line, including the lines operated in the name of defendant, and those operated in other names but of which defendant owned a majority of the capital stock.

3. Which of the roads listed in answer to the foregoing question reported to the Interstate Commerce Commission as operating railways?

4. How much of the mileafe disclosed in the answer to question two, was within Kentucky; and what lines within Kentucky did defendant control by owning a majority of the capital stock of the corporation in whose name it was operated?

5. Give the name of each County in Kentucky and the number of miles of railroad therein which defandant or the

"Southern Railway Company in Kentucky," Mobile & Ohio Railroad, Comberland Railroad, Cumberland Railway operated?

6. Did any other company listed in answer to question two above operate within Kentucky, If so, which of them and give the Counties in which operations were carried on and the mileage therein.

7. What was the total of the railway operating revenue for each of the roads listed in answer to question two above?

8. What was the total railway operating expenses for each of said roads?

9. What were the total railway tax accruals for each of said roads?

10. What was the total non-operating income for each of said roads?

11. What further amounts of money were deducted from income of each of said roads to determine the profit and loss for said year? Give general classification and amounts.

12. Explain briefly the nature of each of these deductions, that is, explain what the deductions represent or the nature of the expense.

[fol. 12] 13. Name the officers and directors of the "Southern Railway in Kentucky" and state what relation, if any, each of them bore to defendant.

14. Name the officers of the Mobile & Ohio and state what relation, if any, each of them bore to defendant.

15. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant.

16. Name the officers and directors of the Cumberland Railway and state what relation, if any, each of them bore to defendant.

17. What interest, if any, did the defendant, Southern Railway Company, or any one or more of its subsidiaries have in the capital stock, management, directorate or control of the Cincinnati-New Orleans and Texas Pacific Rail-

way Company? Did defendant or any one or more of its subsidiaries operate, own, lease or control same?

III. The defendant will answer each of the above seventeen interrogatories for the year ending June 30, 1915.

IV. The defendant will answer each of the above seventeen interrogatories for the year ending June 30, 1916.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

ORDER CONTINUING CAUSE—May 24, 1920

This day came the defendant, Southern Railway Company, and filed a demurrer to the statements if the Plaintiff, Commonwealth of Kentucky, on relation etc.

On motion of the defendant, this proceeding is now ordered to be and it is hereby continued to the June, 1920, Term of this Court, and the defendant is given until that time in which to prepare its pleadings herein, with the understanding that such pleading as it may prepare and file herein does not waive said demurrer, and if it can and does prepare its answer prior to the date mentioned, it will furnish the attorneys for the plaintiff a copy thereof as soon as said answer is completed.

Said Order is endorsed Entered in Order Book No. 3, page 526.

[fol. 13] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

DEMURRER—Filed May 24, 1920

The defemdamt, Southern Railway Company, demurs to the statement of the plaintiff, Commonwealth of Kentucky on relation etc. because the same does not state facts sufficient to support or constitute a cause of action against it.

A. P. Humphrey, Wallace & Harris, Attorneys for Defendant.

[File endorsement omitted.]

In County Court of Woodford County

[Title omitted]

Minute Entries—June 28, 1920

This day came the defendant, Southern Railway Company, and without waiving the demurrer heretofore filed by it, herein, but expressly replying thereon, filed its answer.

Thereupon came the plaintiff and filed its reply to said answer: and it is agreed that the affirmative allegations may be and they are hereby by the defendant traversed of record.

In County Court of Woodford County

Order Filing Stockholders' Reports—June 28, 1920

Came the Plaintiff and tendered and moved to file herein as evidence the stockholders reports for the years 1914, 1915 and 1916, issued by the defendant, to which the defendants objected, and the motion is submitted to the Court: And the Court being advised said objections is overruled and said reports are now ordered to be and they are hereby filed, to which ruling of the Court as to each report the defendant objects and excepts and this case is continued.

Said Order is endorsed Entered in Order Book No. 4, page 543.

In County Court of Woodford County

[Title omitted]

Answer—Filed June 28, 1920

The defendant, the Southern Railway Company, denies that during or for any part of the period mentioned in the [fol. 14] first Paragraph of the Statement it was performing service as a common carrier of passengers or freight for hire in Woodford County, Kentucky, or in any other County of Kentucky. It denies that during the year ended June 30, 1914, it operated or owned any line or lines of railroad in Kentucky, and denies that under the Kentucky Statutes made and provided it is liable for the payment of any franchise tax whatever for the taxing year of 1915.

Defendant denies that under the Kentucky Statutes it was its duty to file the report details of which are given in said first Paragraph of the Statement, or any report whatever.

Defendant denies that it had or exercised any franchise whatever in the State of Kentucky. It says that the said four roads mentioned in the Statement were operated under their own franchises and each of said roads filed its own report by its own officers. Defendant denies that it filed said reports.

Defendant denies that it operated or owned any of the lines of the said four subsidiary companies, and denies that it knew that it was under any duty whatever to file any report. It denies that said reports were filed for the purpose of concealing any property of this defendant in this State, or for the purpose of escaping taxation on any property ~~of~~ this defendant in this State; and defendant denies that it did thereby conceal any portion of its property or cause any portion of its property to be omitted from assessment, and denies that its franchise was subject in any way to assessment in Kentucky.

Defendant says that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the names of the persons who were elected directors. Defendant admits that this defendant was the beneficial owner in the rest of said stock, the total stock outstanding being ten thousand (10,000) shares.

As to the Cumberland Railroad Company, defendant says that during the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendant says that during the period in controversy there was outstanding in the name of its directors a sufficient quantity of stock to qualify them as such.

Defendant denies that each or any of said miles were at any time a part of the general system of this defendant extending into various states of the Union, except as to the fact—which is admitted—that the defendant owned a majority of the stock of said separate corporation—Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

[fol. 15] The total mileage of this defendant for the period stated in the first Paragraph of the Statement is 9,395.82 miles; and the mileage of the lines mentioned in the said first Paragraph of the Statement was 212.16 miles; so that the proportion of the mileage of the said four railroads in Kentucky, to the total mileage of this defendant, operated, owned, leased and controlled, was 2.258 per cent.

Defendant denies that the net earnings or income of this defendant, inclusing interest and dividends received from securities held by it, for said year, was the amount set forth in the first Paragraph of the Statement, or anything more than $16,217,957.73. Defendant states that this sum capitalized at 6 per -net would amount to $270,299,295.55.

The defendant will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the first Paragraph o[illegible] Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the Paragraphs of the Statement.

Defendant denies that the amount set out in the Statement was the true total value of the whole property of this defendant in and out of Kentucky for said year, or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer and the defendant now denies that any portion of defendant's property in Kentucky was omitted from assessment for the year

1915, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 2

In answer to the Second Paragraph of said Statement the defendant denies that during or for any part of the period mentioned in the second Paragraph of the Statement it was performing service as a common carrier of passengers or freight for hire in Woodford County, Kentucky, or in any other county of Kentucky. It denies that during the year ended June 30, 1915, it operated or owned any lines of railroad in Kentucky, and denies that under the Kentucky Statutes made and provided it is liable for the payment of any franchise tax whatever for the taxing year 1916.

Defendant denies that under the Kentucky Statutes it -as its duty to file the report details of which are given in said second paragraph of the Statement, or any report whatever.

Defendant denies that it had or exercised any franchise whatever in the State of Kentucky. It says that the said four roads mentioned in the Statement were operated under their own franchise and each of said roads filed its own report by its own officers. Defendant denies that it filed said reports.

Defendant denies that it operated or owned any of the lines of the said four subsidiary companies, and denies that it knew that it was under any duty whatever to file any report. It denies that said reports were filed for the purpose of concealing any property of this defendant in this [fol. 16] State, or for the purpose of escaping taxation on any property of this defendant in this State; and defendant denies that it did thereby conceal any portion of its property or cause any portion of its property to be omitted from assessment, and denies that its franchise was subject in any way to assessment in Kentucky.

Defendant says that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the names of the persons who were elected directors. Defendant admits that this defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares.

As to the Cumberland Railroad Company, defendant says that in the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendant says that there was outstanding in the name of its directors a sufficient quantity of stock to qualify them as such.

Defendant denies that each or any of said mileage were at any time a part of the general system of this defendant extending into various states of the Union, except as to the fact which is admitted that the defendant owned a majority of the stock in each of said separate corporations; Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; and the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

The total mileage of the defendant for the period set forth in the second Paragraph of the Statement was 9,523.15 miles; and the mileage of the lines mentioned in said second Paragraph of the Statement was 216.48 miles; so that the proportion of the mileage of the said four railroads in Kentucky to the total mileage of this defendant, owned, operated, leased and controlled, was 2.273 per cent.

Defendant denies that the net earnings or income of this defendant, including interest and dividends from securities held by it, for said year, was the amount set forth in the second Paragraph of the Statement, or anything more than $13,110,019.89. Defendant states that this sum capitalized at 6 per cent would amount to $218,500,331.50. The defendant will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the second paragraph of the statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes it allegations in that respect applicable to each of the paragraphs of the Statement.

[fol. 17] Defendant denies that the amount set out in the Statement as the true value of the whole property of this defendant in and out of Kentucky for said year; or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendant now denies that any portion of defendant's property in Kentucky was omitted from assessment for the year 1916, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 3

In answer to the third Paragraph of said Statement the defendant denies that during or for any part of the period mentioned in the third Paragraph of the Statement it was performing service as a common carrier of passengers of freight for hire in Woodford County, Kentucky, or in any other County of Kentucky. It denies that during the year ended June 30, 1916, it operated or owned any line or lines of railroad in Kentucky, and denies that under the Kentucky Statutes made and provided it is liable for the payment of any franchise tax whatever for the taxing year 1917.

Defendant denies that under the Kentucky Statutes it was it's duty to file the report details of which are given in said third paragraph of the Statement, or any report whatever.

Defendant denies that it had or exercised any franchise whatever in the State of Kentucky. It says that the said four roads mentioned in the Statement were operated under their own franchises and each of said roads filed its own report by its own officers. Defendant denies that it filed said reports.

Defendant denies that it operated or owned any of the lines of the said four subsidiary companies, and denies that it knew that it was under any duty whatever to file any report. It denies that said reports were filed for the purpose of concealing any prlperty of this defendant in this State, or for the purpose of escaping taxation on any property of this defendant in this State; and defendant denies that it did thereby conceal any portion of its property or cause any portion of its property to be omitted from assessment, and denies that its franchise was subject in any way to assessment in Kentucky.

Defendant says that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period of controversy eighteen (18) shares of such stock in the names of the persons who were elected directors. Defendant admits that this defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares.

As to the Cumberland Railroad Company, defendant says that in the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendant says that there was outstanding in the name of its directors a sufficient quantity of stock to qualify them as such.

[fol. 18] Defendant denies that each or any of said miles were at any time a part of the general system of this defendant extending into various states of the Union, except as to the fact which is admitted that the defendant owned a majority of the stock in each of said separate corporations; Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

The total mileage of this defendant for the period set forth in the third Paragraph of the Statement was 9,522.79 miles; and the mileage of the lines mentioned in the said third Paragraph of the Statement was 219.88 miles; so that the proportion of mileage of the said four railroads in Kentucky to the total mileage of this defendant, owned, operated, leased and controlled, was 2.309 per cent.

Defendant denies that the net earnings or income of this defendant, including interest and dividends received from securities held by it, for said year, was the amount set forth in the said third Paragraph of the Statement, or anything more than $21,047,540.00. Defendant states that this sum capitalized at 6 per cent would amount to $350,792,333.00.

The defendant will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the third Paragraph of the Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the paragraphs of the Statement.

Defendant denies that the amount set out in the Statement was the true total value of the whole property of this defendant in and out of Kentucky for said year, or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendant now denies that any portion of defendant's property in Kentucky was omitted from assessment for the year 1917, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 4

Further answering, this defendant says that for the taxing years 1915, 1916 and 1917, dealt with in the Statement herein, the assessing authorities of the State of Kentucky—The State Board of Valuation and Assessment and the Tax Commission, have uniformly established and acted upon a rule of ascertaining the value of the franchise of railroad companies subject to assessment in Kentucky, which was applied to all of said railroads. This rule was to ascertain the net earnings of the said railroad company, taxes being [fol. 19] deducted, and then to capitalize these net earnings at 6 per cent, and then to take 60 per cent of the amount thus arrived at, and to fix the amount thus determined as the value of the capital stock of said railroad. And this was the method uniformly applied by said assessing authorities of the State of Kentucky as aforesaid, during the periods mentioned in the Statement to which this answer is a response.

The defendant further says that for each of the taxing years mentioned in the Statement herein local assessors and other assessing officers of the State of Kentucky have habitually, intentionally, systematically and generally assessed the property of individuals and of corporations within their sphere of duty, comprising 80 per cent of the total taxable property, at not exceeding 52 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale; that the fact of such systematic assessment upon that basis annually for many years past has been a matter of public notoriety in the State; that notwithstanding this the said State Board of Valuation and Assessment and Tax Commission have adopted a method which resulted in an assessment of railroad tangible and intangible property at 60 per cent of its fair cash value.

The defendant says that having ascertained the value of the capital stock of the railroads in this State subject to assessment by the above described method the taxing authorities ascertained the total mileage of all lines owned, operated, leased and controlled by said several companies, and assigned to Kentucky that proportion of the thus ascertained value of the capital stock of the lines owned, operated, leased and controlled, that the said lines in Kentucky bore to the total length of said lines. From this value of the capital stock so ascertained there was deducted the tangible property of said several railroads assessed in Kentucky.

The defendant says that it would be a violation of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment thereof, for this Court to adopt any method in making an assessment herein (if any could be made) on a less favorable basis to defendant than the one above described.

Paragraph 5

And the defendant further says that in none of said periods did it have any tangible property in the State of Kentucky; that it had no intangible property in the State of Kentucky during said period; that if the Court should be of opinion, under all the *all the* facts and circumstances of this case, that the property in Kentucky, tangible and intangible, of the four railroads mentioned in the Statement herein, should be assessed against this defendant, then this defendant says that this assessment has already been made by the States Board of Valuations and Assessment and the Railroad Commission for each of said years; that is to say, that the tangible property of each of said corporations has been assessed; the value of the capital stock of each of said [fol. 20] corporations has been ascertained; the total value of tangible and intangible property of each of said companies has been ascertained and all the taxes paid thereon; that in order that the value of the capital stock of these four corporations assignable to Kentucky should be determined the said taxing authorities have taken into consideration all the facts necessary to that end, and have fixed the value of the tangible property and of the franchise of each of said corporations as aforesaid.

Defendant further says that as contributing to the earnings of the defendant and to the value of its capital stock it owned and operated, in states other than Kentucky, during the said several years, many miles of double track, that is, as of June 30, 1914, 391.42 miles; as of June 30, 1915, 422.81 miles; and as of June 30, 1916, 480.20 miles; whereas all the lines in Kentucky of the corporations mentioned in the Statement herein were single track; that this double track mileage cost a very large sum and contributed very largely to the earnings of the property; that besides this the said defendant had at various points on its lines very extensive costly and valuable terminals, machine shops, such as at Spencer, North Carolina, Knoxville, Tennesse, Atlanta, Georgia, and other points; that none of the railroads mentioned in the Statement herein had in Kentucky valuable property of this character.

Defendant says that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky and earnings derived from property not in Kentucky; that to do this would be in violation of the Constitution of the State of Kentucky and of the Constitution of the United States; particularly the Fourteenth Amendment thereof.

And so it is that this defendant says that if the Court should hold that the Southern Railway Company is subject to any assessment in this State by reason of any ownership, operation, lease or control of the properties of any or all of the lines of railroad mentioned herein, then all values inherent therein, either tangible or intangible, have already been assessed by the proper assessing officers of the State of Kentucky, and to attempt to add to that assessment would be in violation of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment thereof; and the defendant prays that this suit may be dismissed, and for all proper relief.

Wallace & Harris, Humphrey, Crawford & Middleton,
Attorneys for Defendant.

IN COUNTY COURT OF WOODFORD COUNTY

ANSWERS TO INTERROGATORIES, SOUTHERN RAILWAY COMPANY

Q. In the Statistics of Railways in the United States compiled by the Interstate Commerce Commission for the [fol. 21] year ended June 30, 1913, opposite the name of the "Southern Railway in Kentucky" are these words: "Merged in Southern Railway Company, July 1, 1912." Is that statement true? And if so, what change, if any, has been made since and when?

A. The notation "merged in Southern Railway Company, July 1, 1912" was intended to mean that the operating results of the Southern Railway Company in Kentucky has been consolidated with those of the Southern Railway Company, as, under the rules and regulations of the Interstate Commerce Commission, a separate operating report for the Southern Railway Company in Kentucky was not required. The method of consolidating these reports had not been changed since that date.

Q. 1. What was the total mileage of railway lines which were operated, owned, leased and controlled by defendant; including lines controlled by the ownership of a majority of the capital stock?

A.—1914	9,395.82	miles.
1915	9,523.15	"
1916	9,522.79	"

Q. 2. What were the names of the railways which were owned, operated, leased and controlled by defendant? Give the length of each line, including the lines operated in the name of defendant; and those operated in other names but of which defendant owned a majority of the capital stock?

A. See Exhibit A for 1914, A for 1915 and A for 1916.

Q. Which of the roads listed in answer to the foregoing question reported to the Interstate Commerce Commission as operating railways?

A.

1914	1915	1916
The A. G. S. R. R. Co.	The A. G. S. R. R. Co.	The A. G. S. R. R. Co.
Ashville & Craggy Mtn.	Ashville & Craggy Mtn.	Ashville & Craggy Mtn.
Blue Ridge Ry. Co.	Blue Ridge Ry. Co.	Ashville & Craggy Mtn.
Cumberland R. R. Co.	Cumberland R. R. Co.	Blue Ridge Ry. Co.
Danville & Western Ry.	Karo & Tenn. Sou. Ry. Co.	Cumberland R. R. Co.
Ga. Sou. & Fla. Ry. Co.	Danville & Western Ry. Co.	Danville & Western
Hartwell Ry. Co.	Ga. Sou. & Fla. Ry. Co.	Ga. Sou. & Fla.
Mobile & Ohio R. R. Co.	Hartwell Ry. Co.	Hartwell Ry. Co.
Northern Ala. Ry. Co.	Mobile & Ohio R. R. Co.	
Tallulah Falls Ry. Co.	Northern Ala. Ry. Co.	
Virginia & South W. Ry. Co.	Tallulah Falls Ry. Co.	Mobile & Ohio.
Southern Ry. Co.	Virginia & South W. Ry. Co.	Northern Ala. Ry. Co.
	Southern Ry. Co.	Va. & Sou. West. Ry. Co.
		Tallulah Falls Ry.
		Southern Ry. Co.

[fol. 22] Q. 4. a. How much of the mileage disclosed in the answer to question two was within Kentucky?

b. And what lines -ithin Kentucky did defendant control by owning a majority of the capital stock of the corporation in whose name it was operated?

A. a.	1914	1915	1916
	187.07 miles	187.07 miles	187.07 miles
b.	Sou. Ry. in Ky. Cumberland R. R. Cumberland Ry. Mobile & Ohio.	Same as 1914.	Same as 1914.

Q. 5. Give the name of each County in Kentucky and the number of miles of railroad therein which defendant or the "Southern Railway Company in Kentucky" Mobile & Ohio Railroad Company, Cumberland Railroad, Cumberland Railway operated.

A.—

Mobile & Ohio Railroad:

Fulton County	6.635	miles.
Hickman County	17.052	"
Carlisle County	10.576	"
Ballard County	4.430	"
Total	#38.693	miles.

Southern Railway in Kentucky:

Main Lines:

Jefferson County	21.387	miles.
Shelby County	24.299	"
Anderson County	17.555	"
Mercer County	18.229	"
Boyle County	2.000	"
Total Main Line	83.470	"

Lexington Branch:

Anderson County	3.347	miles.
Woodford County	12.047	"
Fayette County	8.206	"
Total Lexington Branch	23.600	"

Georgetown Branch:

Woodford County	9.138	"
Scott County	7.600	"
Total Georgetown Branch	16.738	"

[fol. 23] Burgin Branch:

Mercer County	3.820	
Total Burgin Branch	3.820	"
Grand Total	*127.628	miles.

Cumberland Railway:

Bell County	1.74	miles.

Cumberland Railroad Co.:

Knox County	12.90	miles.

Q. 6. Did any other company listed in answer to question two above operate within Kentucky? If so, which of them and give the counties in which operations were carried on and the mileage therein.

A. No.

---

*Does not include lines operated under trackage rights.

Q. 7. What was the total of the railway operations revenues for each of the roads listed in the answer to question two above?

A. See Exhibits B for 1914, B for 1915 and B for 1916 (two sheet-).

Q. 8. What was the total railway operating expenses for each of said roads?

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two sheets).

Q. 9. What was the total railway tax accruals for each of said roads?

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two sheets).

Q. 10. What was the total non-operating income for each of said roads?

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two sheets).

Q. 11. What further amounts of money were deducted from income of each of said roads to determine the profit and loss for said year? Give general classification and amount.

A. See Exhibits B for 1914, B for 1915 & B for 1916 (Two sheets).

Q. 12. Explain briefly the nature of each of these deductions, that is explain what the deductions represent or the nature of the expense.

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two Sheets).

Q. 13. Name the officers and directors of the "Southern Railway in Kentucky" and state what relation, if any, each of them bore the defendant.

A. —

Directors

1914	1915	1916
A. B. Anderson.#	Fairfax Harrison.#	W. S. Camp.
Fairfax Harrison.#	C. E. McCarthy.	Fairfax Harrison.#
C. E. A. McCarthy.	E. A. Merrill.	C. E. A. McCarthy.
E. A. Merrill.	H. B. Spencer.#	E. A. Merrill.
H. B. Spencer.	F. S. Wynn.	H. B. Spencer.#
F. S. Wynn.		F. S. Wynn.

#Also Directors Southern Railway Co.

[fol. 24]

Officers

1914	1915	1916
Pres., Fairfax Harrison	Fairfax Harrison	Fairfax Harrison.
V. P., A. B. Anderson	J. M. Culp	J. M. Culp.
" J. M. Culp	T. C. Powell	T. C. Powell.
" T. C. Powell	H. B. Spencer	H. B. Spencer.
" H. B. Spencer	H. W. Miller	H. W. Miller.
Sec., F. S. Wynn	F. S. Wynn	F. S. Wynn.
Treas., H. C. Ansley	H. C. Ansley	H. C. Ansley.
Gen. Counsel at N. Y., F. L. Stetson	F. L. Stetson	F. L. Stetson.
Gen. Counsel at Louisville, Ky., A. P. Humphry	H. P. Humphry	H. P. Humphry.
Comp., A. H. Plant	A. H. Plant	A. H. Plant.
V. P. & G. M., E. H. Coapman	E. H. Coapman	E. H. Coapman.

Officers held similar office with Southern Railway Company.

Q. 14. Name the officers and directors of the Mobile & Ohio and state what relation, if any, each of them bore to defendant.

A. —

Directors

1914	1915	1916
Albert P. Bush.	Albert P. Bush.	Albert P. Bush.
Guy Cary.	Guy Cary.	Guy Cary.
Henry Hall.	Henry Hall.	Johnston Deforest.
Fairfax Harrison.‡	Fairfax Harrison.‡	Henry Hall.
Adrian Iselin, Jr.‡	Adrian Iselin, Jr.‡	Fairfax Harrison.‡
Ernest Iselin.	Ernest Iselin.	Adrian Iselin, Jr.‡
W. Emlen Roosevelt.	W. Emlen Roosevelt.	Ernest Iselin.
C. Sidney Shepard.	C. Sidney Shepard.	W. Emlen Roosevelt.
H. B. Spencer.	H. B. Spencer.‡	C. Sidney Shepard.
H. N. Street.	A. H. Stevens.	H. B. Spencer.‡
A. H. Stevens.	H. M. Street.	H. M. Street.
R. V. Taylor.	R. V. Taylor.	R. V. Taylor.
Samuel Woolverton.	Samuel Woolverton.	Samuel Woolverton.

[fol. 25]

Officers of Mobile & Ohio

1914	1915	1916
Pres., Fairfax Harrison*	Fairfax Harrison*	Fairfax Harrison.*
1st V. P., A. B. Andrews*		
V. P. & G. M., R. V. Taylor	R. V. Taylor	R. V. Taylor.
Secy., A. W. McIntosh	F. S. Wynn*	F. S. Wynn.*
Treas., H. C. Ansley*	H. C. Ansley*	H. C. Ansley.*
Asst. Treas. & Asst. Secy., Geo. A. Cooke	Geo. A. Cooke	Geo. A. Cooke.
Comp., C. B. Hays	C. B. Hays	C. B. Hays.
Gen. Counsel, S. R. Prince	S. R. Prince	S. R. Prince.
Gen. Supt., E. C. Randell	E. C. Randell	E. C. Randell.
Frt. & Trf. Mgr., Haiden Miller	Haiden Miller	Haiden Miller.
Gen. Frt. Agt., J. M. Denyven	J. M. Denyven	J. M. Denyven.
Gen. Pass. Agt., C. Rudolph	C. Rudolph	C. Rudolph.

#Also Directors Southern Railway Co.

*Held similar office with Southern Railway Company.

Q. 15. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant.

A. —

Directors

1914	1915	1916
R. W. Stone.	A. J. Hazeltine.	A. J. Hazeltine.
L. R. Freeman.	L. R. Freeman.	L. R. Freeman.
W. M. Lindsey.	C. B. Ayers.	C. B. Ayers.
A. J. Haxeltine.	G. H. Dunham.	G. H. Dunham.
C. B. Ayers.	R. W. Stone.	R. W. Stone.
G. H. Dunham.		J. L. Stone.
F. F. Whittekin.	F. F. Whittekin.	F. F. Whittekin.

Officers

1914	1915	1916
Pres., R. W. Stone	R. W. Stone	R. W. Stone.
V. Pres., C. B. Ayers	C. B. Ayers	C. B. Ayers.
Sec'y J. L. Stone	J. L. Stone	J. L. Stone.
Treas., A. J. Hazeltine	A. J. Hazeltine	A. J. Hazeltine.
Auditor, W. B. Starke	W. B. Starke	A. G. Matheson.
Gen. Mgr., T. H. Hayden	T. H. Hayden	T. H. Hayden.
[fol. 26] Gen. Frt. Agent, W. B. Starke	W. B. Starke	A. C. Matheson.
Gen. Pass. Agent, W. B. Starke	W. B. Starke	A. C. Matheson.
Chief Rngr., —— ——	—— ——	T. H. Haydon.
Gen. Coun., Jas. D. Black	Jas. D. Black	—— ——.

Officers and directors not connected with Southern Railway Company.

Q. 16. Name the officers and directors of the Cumberland Railway and state what relation, if any, each of them bore to defendant.

A.—

Directors

1914	1915	1916
D. A. Carpenter.	D. A. Carpenter.	D. A. Carpenter.
W. P. Chamberlain.	W. P. Chamberlain.	W. P. Chamberlain.
Henry Donde.	Fairfax Harrison.*	Fairfax Harrison.
S. R. Luttrell.	S. R. Luttrell.	S. R. Luttrell.
G. W. Montgomery.	G. W. Montgomery.	G. W. Montgomery.

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* Also director of Southern Railway Co.

## Officers

1914	1915	1916
Pres., Henry Fonde#	Fairfax Harrison#	Fairfax Harrison.#
V. Pres., H. B. Spencer#	H. B. Spencer#	H. B. Spencer.#
Sec'y, F. S. Wynn#	F. S. Wynn#	F. S. Wynn.#
Treas., H. C. Ansley#	H. C. Ansley#	H. C. Ansley.#
Gen. Coun., A. P. Humphrey#	A. P. Humphrey.#	A. P. Humphrey.#
Compt., A. H. Plant#	A. H. Plant#	A. H. Plant.#
Gen .Mgr., E. H. Coapman#	E. H. Coapman#	E. H. Coapman.#

EXHIBIT A FOR 1914

Mileage Statistics

Owned, Leased, Controlled, and Operated by Southern Ry. Co. Year Ended June 30, 1914

Owned:		
Southern Railway Company		4,104.20
[fol. 27] **Leased:**		
Southern Railway—Carolina Division	758.03	
Elberton Southern Railway	50.60	
Mobile & Birmingham	150.35	
Richmond & Mecklenburgh Railroad	31.30	
Georgia Midland Railway	97.88	
North Carolina Railroad	224.34	
Atlanta & Charlotee Air Line Ry	263.08	
Atlantic & Danville Railway	267.69	
North & South Carolina Railroad	4.45	
Lockhart Railroad	13.81	
The Whitney Company	6.20	
Wooldridge Jellico Coal Co.	1.75	
		1,869.48
Operated under Agreement:		
Southern Railway Company in Mississippi		11.40
Trackage Rights		484.70

# Officers held similar office with Southern Railway Company.

Controlled by Ownership of Stock:

State University Railroad	10.20	
North Carolina Midland Railroad	53.52	
High Point, Randleman, Asheboro & Sou	26.80	
Yadkin Railroad	41.00	
Sievern & Knoxville Railroad	17.44	
Atlantic & Yadkin Railway	161.08	
Ensley Southern Railway	33.42	
Roswell Railroad	12.55	
Cumberland Railway	11.21	
Carolina & Tennessee Southern Railway	13.90	
Tennessee & Carolina Southern Railway	25.30	
Southern Railway in Kentucky	127.75	
The Alabama Great Southern Railroad Co.	309.41	
Ashville & Craggy Mountain Railway Co.	4.44	
Blue Ridge Railway Company	44.00	
Cumberland Railroad Company	12.90	
Danville & Western Ry. Co.	83.00	
Georgia Southern & Florida Railway Co	395.00	
Hartwell Railway Company	10.10	
Mobile & Ohio Railroad	1,122.48	
Northern Alabama Railway Co.	112.50	
Tallulah Falls Railway Co	58.00	
Virginia & Southwestern Ry. Co.	240.14	
		2,926.14
Total		9,395.82

[fol. 28] Exhibit B, 1914, is in words and figures as follows, to-wit:

Woodford Circuit Court

Commonwealth of Kentucky
v.
Southern Railway Co.,

Commonwealth of Kentucky
v.
Southern Railway Co.,
and Walker D. Hines

It is agreed by counsel for the parties in the above-named causes that the following original exhibits shall not be copied by the Clerk, but that said exhibits shall be taken from the record in the Woodford Circuit Court and attached to the copy of the record for the Court of Appeals, and when so attached they shall have the same effect as if the Clerk had made copies thereof in the record. The exhibits referred to are the exhibits headed "Income Account year 1914, Income Account year 1915, and Income Account Year 1916," all marked Exhibit B, and which are filed with the answer of the defendant in the first-named cause; also Income Account June 30, 1917, and Federal Income Account, December 31, 1918, both marked Exhibit B, filed with the answer of the defendant in the last-named cause.

The Clerk will copy this stipulation with the record for the Court of Appeals.

Leslie W. Morris, Hobson & Hobson, for Plaintiff.
Wallace & Harriss, Humphrey, Crawford & Meddleton, for Defendants.

Said stipulation is endorsed "filed Aug. 10, 1921. Attest: C. A. Witt, Clerk.

Exhibit A for 1915

Mileage Statistics

Owned, Leased, Controlled, and operated by Southern Ry. Co. Year Ended June 30, 1915

Owned:		
Southern Railway Company		4,226.29
[fol. 29] Leased:		
Southern Railway—Carolina Division	757.83	
Elberton Southern Railway	50.60	
Mobile & Birmingham Railroad	150.35	
Richmond & Mecklenburgh	31.30	
Georgia Midland Ry.	97.88	
North Carolina Railroad	220.77	
Atlanta & Charlotte Air Line Ry.	263.08	
Atlantic & Danville Rwy.	267.69	
North & South Carolina R. R.	3.73	
Lockhart Railroad	13.81	
The Whitney Co.	6.20	
Woolridge-Jellico Coal Co.	1.75	
		1,864.99

Operated under Agreement:		
Southern Railway Company in Mississippi		11.40
Trackage Rights		491.64
Controlled by Owenership of Stock:		
State University Railroad	10.20	
North Carolina Midland Railroad	53.52	
High Point, Randelman, Asheboro & Southern	27.59	
Yadkin Railroad	41.00	
Sievern & Knoxville Railway	17.44	
Atlantic & Yadkin Railway	163.10	
Ensley Southern Railway	33.42	
Roswell Railroad	12.55	
Cumberland Railway	11.21	
Tennessee & Carolina Southern Ry.	25.30	
Southern Railway in Kentucky	127.63	
Alabama Great Southern Railroad Co.	309.41	
Ashville & Craggy Mount. in Railway Co.	4.44	
Blue Ridge Railway Co.	44.00	
Cumberland Railroad Co.	12.90	
Carolina & Tennessee Southern Railway Co.	13.90	
Danville & Western Railway Co.	83.00	
Georgia Southern & Florida Ry. Co.	395.00	
Hartwell Railway Co.	10.10	
Mobile & Ohio Railroad Co.	1,122.48	
Northern Alabama Railway Co.	122.50	
Tallulah Falls Railway Co.	58.00	
Virginia & Southwestern Ry. Co.	240.14	
		2,928.83
Total		9,523.15

[fol. 30] Exhibit "B" for 1915 is in words and figures as follows, to-wit:

Exhibit A for 1916

Mileage Statistics

Owned, Leased, Controlled, and Operated by Southern Ry. Co. Year Ended June 30, 1916

Owned:		
Southern Railway Company		4,212.64
Leased:		
Southern Railway—Carolina Division	757.72	
Elberton Southern Railway	50.60	
Mobile & Birmingham Railroad	150.35	
Richmond & Mecklenburgh Railroad	31.30	
Georgia Midland Railway	97.88	
Memphis-Chattanooga Railway	2.83	
North Carolina Midland Railroad	53.52	
North Carolina Railroad	225.95	
Atlanta & Charlotte Air Line Railway	263.08	
Atlantic & Danville Railway	277.71	
North & South Carolina Railroad	3.73	
Lockhart Railroad	13.81	
Talla-ssee Power Company	11.23	
Woolridge-Jellico Coal Co.	1.75	
		1,941.46
Operated under Agreement:		
Southern Railway Co. in Mississippi		11.40
Trackage Rights		495.42
Controlled by Ownership of Stock:		
State University Railroad	10.20	
High Point, Ranbelman, Asheboro & Southern	27.98	
Yadkin Railroad	41.00	
Sievern & Knoxville Railroad	17.44	
Atlantic & Yadkin Railway	163.10	
Ensley Southern Railway	33.42	
Roswell Railroad	12.55	
Cumberland Railway	11.21	
Tennessee & Carolina Southern Railway	29.89	

Southern Railway In Kentucky	127.64	
Alabama Great Southern Railroad Co.	312.41	
Asheville & Craggy Mt. Ry. Co.	4.44	
Blue Ridge Railway Co.	44.00	
Cumberland Railroad Co.	12.90	
Danville & Western Ry. Co.	83.00	
Georgia Southern & Florida Ry. Co.	402.47	
Hartwell Railway Co.	10.10	
[fol. 31] Mobile & Ohio Railroad Co.	1,122.48	
Northern Alabama Railway Co.	112.50	
Tallulah Falls Railway Co.	58.00	
Virginia & Southwestern Ry. Co.	225.14	
		2,861.87
Total		9,522.79

Exhibit "B" for 1916 is in words and figures as follows, to-wit:

In answer to the 17th interrogatory the following are the facts:

Prior to and since the 1st of January, 1917, a corporation called the Southwestern Construction Company, owned a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. The Southern Railway Company owned a certain number of shares of the stock of the Southwestern Construction Company, and the Alabama Great Southern Railroad Company owned a certain number of the shares of stock of the said Southwestern Construction Company. The Southern Railway Company owned a majority of the stock in the Alabama Great Southern Railroad Company. The ownership of the Southern Railway Company and the Alabama Great Southern Railroad Company in the stock of the Southwestern Construction Company was less than half of said stock. Since January 1, 1917, the amount of stock in the Southwestern Construction Company owned by the Southern Railway Company and the Alabama Great Southern Railroad Company has been more than half of said stock.

The Item "Hire of Equipment" is the balance due by the Southern Railroad Company to other railroads on account of the use of the equipment of such other railroads, less any balance due to the Southern Railroad Company for the use of its equipment by other railroads.

"Joint Facility Rents" are the amounts due by the Southern Railway Company to other railroads or terminal companies on account of the use of such property as terminal facilities, owned by such other railroads or terminal companies, less any amounts due to the Southern Railway Company for the use of its terminal facilities or other similar property, by other railroads or terminal companies.

In ascertaining the net income of railroads, which income in capitalized in order to ascertain the values of the capital stock of said railroads, it is and has been, during the years in controversy herein, the fixed rule of the assessing authorities of Kentucky to deduct taxes, hire of equipment in debit and joint-facility rents in debit.

Sworn to by Alex. P. Humphrey; jurat omitted in printing.

[File endorsement omitted.]

[fol. 32] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

REPLY—Filed June 28, 1920

Comes the Commonwealth of Kentucky by Robert Hawkins, Sheriff of Woodford County and for its Reply to paragraphs one, two and three of the Answer of defendant says that the net earnings or income of defendant, according to the statute so made and provided, must include and do necessarily include the net earnings or income of each of the railroads controlled by it. Plaintiff says that the miles of line produce said income and that when said miles of line form a part of the defendant's total system, then the net earnings or income of each of said component parts must be added together to determine the net earnings or income of defendant. Plaintiff therefore denies that the net earnings or income of defendant for the year ending June 30, 1914, was $16,217,957.73 and avers same was $29,093,759.00 as alleged in its statement herein:

Plaintiff further denies that the net earnings or income of defendant for the year ending June 30, 1915, was $13,-110,019.89 and avers same was $25,817,397.00 as alleged in its statement herein: Plaintiff further denies that the net earnings or income of defendant for the year ending June 30, 1916, was $21,047,540.00 and avers same was $36,099,-617.00 as alleged in its statement.

For Reply to Paragraph 4 of defendant's Answer plaintiff says that said Board of Valuation and Assessment may have deducted taxes in fixing the net earnings or income of railroads for each of the said three years. Plaintiff says that the action of said Board in deducting taxes to determine net earnings or income was based on an error of law, in that no natural person is or ever was allowed any deduction for taxes paid in computing the value of intangible property: and it is further provided by the Constitution of this Commonwealth that all corporate property, shall pay the same rate of taxation paid by individual property. The action of said Board in deducting taxes paid by corporations results in corporate property paying at a less rate than paid by individual property.

Plaintiff denies that for each or any of the taxing years mentioned in the statement, local or any assessors or assessor, or other or any assessing officers or officer of the State of Kentucky have either habitually, or intentionally or systematically or generally assessed the property of individuals or individual, or corporations or corporation within their sphere of duty at 52 per cent or any other per cent less than 60 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale. Denies that for any years or any year said alleged assessment has been a matter of public or any notoriety in the State. Plaintiff admits that said Board equalized at sixty per cent to conform with the ruling of the Supreme Court of the United States, Plaintiff denies that it would be a [fol. 33] violation of the Constitution of Kentucky or the United States to make an assessment on a basis of sixty per cent.

And for further Reply to Paragraph 5 of defendant's Answer, plaintiff denies that in none of said periods did defendant have any tangible property in this State, denies that defendant had no tangible property in this State during said periods or any of them. Plaintiff denies that the four lines of railroads within Kentucky or any of them -s set out in its statement herein have been assessed against defendant. An assessment has been made of said four lines, but made on reports which did not state the true facts and did not show the defendant's property in Kentucky. Plaintiff admits that defendant had a double track and certain terminals outside of Kentucky and avers that on account ther-of defendant may be entitled to further equalization of five per cent and not exceeding that, making an admitted equalization of 60% less 5% or 55%. Plaintiff denies this action is an effort to bring into Kentucky for the purpose of taxation, property not in Kentucky or value or values appartaining to property not in Kentucky or earnings derived from property not in Kentucky; denies this action is in violation of the Constitution of Kentucky or the United States; denies that a judgment for plaintiff herein is in violation of the Constitution of Kentucky or the United States.

Wherefore plaintiff prays as in its statement.

W. D. Jesse, Leslie W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

JUDGMENT—September 23, 1920

Came the parties and files Stipulations and by consent these two cases are heard together and the cases being submitted to the Court and the Court being advised it is adjudged by the Court that the Plaintiff's peritions be dismissed and that plaintiff take nothing tjereby to all of which plaintiff expected and prayed an Appeal which is granted.

Said Judgment is endorsed as follows, to-wit: Entered in Order book No. 4, page 594.

[fol. 34] IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendant,

and

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, etc., Defendants

JUDGMENT AND APPEAL ORDER—March 12, 1921

This day came the parties to the above proceedings, and filed stipulations in each case, and by consent these two cases are heard together; and said cases being submitted to the Court on the pleadings, exhibits and stipulations now filed, and the Court being advised, it is adjudged by the Court that the plaintiff's petitions be dismissed in each of said cases, and that plaintiff take nothing in either, to all of which, and as applying to each case, the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is granted.

The printed reports to *be* stockholders and the reports to *to* the Auditor, filed in the record, are not to be copied in the transcript, but will be filed with the transcript with the Clerk of the Court of Appeals: and the stipulations used in the County Court and not in the Circuit Court are not to be copied in the transcript.

The defendants, in each of said causes shall recover of R. S. Hawkins, as sheriff of Woodford County, their costs in said causes expended.

Approved. J. P. Hobson, for Plff.; Chas. M. Harriss for Deft.

In Circuit Court of Woodford County

Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford County, Plaintiff,

vs.

Southern Railway Company, Defendant

Stipulation of Facts—Filed March 12, 1921

The parties hereto, by their respective Counsel, hereby stipulate the following facts as applicable to this case for the purpose of a trial in the Circuit Court.

[fol. 35] 1. The Southern Railway Company of Virginia owns to the extent and set out in the answer to the petition and the answers to the Interrogatories herein the stock of the following four railroads, which do own property and operate in Kentucky, viz.:

Southern Railway Company in Kentucky,
Cumberland Railroad Company,
Cumberland Railway Company,
Mobile & Ohio Railroad Company.

2. When the Southern Railway Company in Kentucky acquired the property of the Louisville Southern Railway Company in 1894, it also acquired the following equipment, viz.:

Steam Locomotives	25
Box Cars	609
Flat Cars	47
Stock Cars	70
Caboose Cars	12
All classes of Freight cars	738
Coaches	15
Combination Passengers Cars	3
Baggage and Express Cars	5
All classes of Passenger Cars	23
Derrick Cars	1
Other Company Service Cars	8
All classes of Cars in service	769

Since that time the above named equipment has been used by Southern Railway Company in Kentucky in common exchange with the defendant, Southern Railway Company of Virginia, that is, portions of the equipment above named have been used by the Southern Railway Company in Kentucky, and portions by the Southern Railway Company of Virginia outside of Kentucky, but where any of this equipment was used by the Southern Railway Company of Virginia, such use by the Southern Railway Company of Virginia was without charge to that Company, in consideration of the Company's furnishing to the Southern Railway Company in Kentucky a like number of engines or cars without charge to the Southern Railway Company in Kentucky.

When any of the above equipment has become out of repair or unfit for service, it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway Company of Kentucky; so that, for every period of time from 1894 up to and including the present time, the Southern Railway Company in Kentucky owns the same number of locomotives, freight and passenger cars, etc., that it did in 1894, and has reported each year and tax-paid each year on the same description and value of equipment as on hand September 1, 1894. The Southern Railway Company in Kentucky has bought no equipment since 1894.

3. Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in [fol. 36] Stipulation 2, it has leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of various other railroad companies, and has done this under the usual traffic arrangements obtaining among railroads, and for such use of equipment has paid to the defendant, Southern Railway Company of Virginia, and other railroads, the regular charges for hire of equipment.

4. No railroad operates entirely with its own rolling stock; that all such rolling stock equipment is more or less common use among the different railroads, and for such use such railroad pays to the owning railroad the regular standard prices.

5. Except for the ownership of stock of the four railroads specified in Stipulation 1, and except for the equipment detailed in Stipulation 3, the Southern Railway Com-

pany of Virginia owns otherwise no property or leases of any kind in the State of Kentucky, and transacts no business in the State of Kentucky, except the solicitation and routing to their destination of freight and passengers, unless, under the evidence and stipulations, it owns or operates said lines of railroad or any of them within the meaning of the Kentucky Statutes and this question is submitted to the Court on all the facts.

6. The printed pamphlets filed June 28, 1920, marked "Annual Report of the Southern Railway Company" for the years in question are the reports of the stockholders made and printed by the corporation and are correct copies of said reports. Plaintiff read on the trial from said Report for 1914, pages 17, 69, 67; for 1915, pages 15, 63, 69; for 1916, pages 55, 56; for 1917, pages 51, 53; for 1918, pages 19, 21 and no other pages were read on the trial.

7. The Southern Railway Company in Kentucky was incorporated under the laws of the State of Kentucky on August 17, 1894. A copy of the articles of imcorporation hereto attached, is a true and correct copy of such articles of incorporation.

The lines of railroad owned and operated by the Southern Railway Company in Kentucky extends from Louisville, Kentucky, in an easterly direction to Danville, Kentucky, passing through Shelbyville, Lawrenceburg and Harrodsburg, Kentucky. There are branch lines extending from Harrodsburg to Burgin, Kentucky; from Lawrenceburg to Lexington, Kentucky, and from Versailles to Georgetown, Kentucky.

At Danville, Burgin, Lexington and Georgetown, the lines of the Southern Railway Company in Kentucky connect with the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company's road from Cincinnati, Ohio, to Chattanooga, Tennessee. At each of such points all of the terminal facilities used by the Southern Railway Company in Kentucky are the property of the Cincinnati, New Orleans & Texas Railway Company.

At Louisville, Kentucky, the passenger depot belonging to the Illinois Central Railroad Company is used.

At Louisville, Kentucky, the Southern Railway Company [fol. 37] in Kentucky uses the passenger depot belonging to the Illinois Central Railroad Company, and the shops, round-houses and freight yards belonging to the Kentucky & Indiana Terminal Railroad Company. The only terminal facility owned in Louisville by the Southern Railway Company in Kentucky is its freight house.

The Southern Railway Company in Kentucky owns no double-track lines and the only terminal facilities owned by it are inexpensive ones situated in the small towns along the route.

What is now the Southern Railway Company in Kentucky was originally chartered *n*y the State of Kentucky in 1868 under the name of the "Louisville, Harrodsburg and Virginian Railroad Company" (Acts 1867-1868, Vol. 2 page 553). In 1884, the charter was amended and the name changed to that of "Louisville Southern Railroad Company" (Acts 1883-1884, Vol. 2, p. 665). The City of Louisville subscribed $100,000 of bonds to aid in the construction of the road (Woolley v. Louisville Southern, 93 Ky. 223, 19 S. W. 595).

In 1888, a line had been built from Louisville, Kentucky to Burgin, Kentucky.

On December 10, 1888, the Louisville Southern Railr*ao*d Company leased all of its property to the Monon Railroad. After this lease, a branch line was constructed from Lawrenceburg, Kentucky, to Lexington, Kentucky.

In 1884, there was chartered by the Legislature the "Versailles & Midway Railroad Company" (Acts 1883-1884, Vol. 2, p. 9), and in 1885, the line from Versailles to Midway, Kentucky, was constructed by that Company.

In 1889, the Louisville Southern Railway Company acquired the stock of the Versailles & Midway Company and the line from Midway, Kentucky to Georgetown, Kentucky was completed and the three roads were consolidated.

In 1890, the Louisville Southern Railroad Company leased all of its property to the East Tennessee, Virginia & Georgia Railway Company and on July 1, 1893, default having be*n*n made in payment of interest on bonds, the property of the Louisville Southern Railroad Company was foreclosed in the Circuit Court of the United States for the District of Kentucky, and the property sold on August 16, 1894, to Charles H. Coster. Thereafter on August 17, 1894, there was incorporated the Southern Railway Company in Kentucky to take over the lines, franchises, etc., of the

Louisville Southern Railroad Company, and that corporation has since continued to own and operate what was formerly the Louisville Southern Railroad Company.

The Southern Railway Company of Virginia was incorporated February 20, 1894. Neither it nor its predecessors had any stock in or control of any of the predecessors of the Southern Railway Company in Kentucky.

8. The Cumberland Railroad Company was incorporated under the laws of the State of Kentucky on —— ——, ——. It owns and operates a line of railroad beginning at Artemus, Kentucky, on the line of the Louisville & Nashville [fol. 38] Railroad Company and running in a southeasterly direction 12.9 miles, all in Knox County, Kentucky. It connects with no other railroad except the Louisville & Nashville Railroad Company at Artemus, Kentucky.

9. The Cumberland Railway Company was incorporated under the laws of the State of Tennessee, and owns and operates a line of railroad 1.74 miles long in Bell County, Kentucky, and extending from a point in Bell County, Kentucky, to tracks of the line of railroad owned and operated jointly by the Louisville & Nashville Railroad Compsny outside of the State of Kentucky.

10. The Mobile & Ohio Railroad Company was chartered by the States of Alabama, Mississippi and Tennessee in 1848 (Acts of Alabama, 1848, p. 225; Laws of Mississippi, 1848: Acts of Tennessee, 1847-1848, p. 177), and in 1848, the State of Kentucky passed an act "to authorize the Mobile & Ohio Railroad Company to extend their railroad from the southern bound-ry of the State of Kentucky to the Mississippi or Ohio Rivers" (Acts of Kentucky, 1847-1848, p. 344). The States of Alabama and Mississippi (1850 and 1852) gave to the Mobile & Ohio Railroad Company a total of 1,156,658.92 acres of land for the purpose of assisting in the financing of that road. On June 30, 1901, the Mobile & Ohio Railroad Company still held 303,102.22 acres of this land. The construction of this road was commenced in March 1852, and completed in December, 1857.

In January, 1901, the Southern Railway Company of Virginia offered to exchange its own securities for enough of the stock and securities of the Mobile & Ohio Railroad Company to give it a majority holding in that Company. By

April, 1901, a majority of the stock and securities of the Mobile & Ohio Railroad Company was thus secured and has been held since by the Southern Railway Company of Virginia.

The road of the Mobile & Ohio Railroad Company extends from St. Louis, Missouri, to Mobile, Alabama. It only passes through one corner of the State of Kentucky, and touches no larger cities in the State of Kentucky. Its total mileage in the State of Kentucky during the years involved was only 38.63 miles.

11. There are no double tracks or extensive or expensive terminals or shops in Kentucky belonging to either the Southern Railway Company in Kentucky, the Cumberland Railroad Company, the Cumberland Railway Company or the Mobile & Ohio Railroad Company.

12. The Southern Railway Company of Virginia owned terminals, shops and double tracks outside of the State of Kentucky of the value of:

[fol. 39] 1914:

Double track	$32,150,853.37
Terminals, etc.	36,855,505.92
Total	$69,006,359.29

1915:

Double track	$34,729,197.06
Terminals, etc.	42,036,197.69
Total	$76,765,394.75

1916:

Double track	$39,443,155.15
Terminals	47,429,637.77
Total	$86,872,792.92

13. The Alabama Great Southern Railway Company owned during the years in controversy terminals of the value of $45,478.12, double tracks;

1914	$183,749.71
1915	943,226.20
1916	1,170,496.52

14. The net income of the Southern Railway Company of Virginia, including that of the railroads owned, operated, leased or controlled by it for the years in controversy was;

1914	$19,066,908.92
1915	15,880,419.66
1916	25,519,430.81

The above figures do not include sums paid for taxes which were as follows:

1914	3,557,879.74
1915	3,418,192.26
1916	3,807,328.92

If the Court is of opinion that the taxes are not deductible in ascertaining net income, the above sums are to be added.

15. The four railroads operating in Kentucky had a combined mileage during the years in controversy as follows:

1914:

The Southern Railway Company in Kentucky	127.628
Mobile & Ohio Railroad Company	38.693
Cumberland Railroad Company	12.90
Cumberland Railway Company	1.74
	180.961
Trackage rights over other railroads	31.20
Total Mileage	212.16

[fol. 40] 1915:

Southern Railway Company in Kentucky	127.628
Mobile & Ohio Railroad Company	38.693
Cumberland Railroad Company	12.90
Cumberland Railway Company	1.74
	180.961
Trackage rights over other railroads	35.519
Total Mileage	216.48

1916:

Southern Railway Company in Kentucky	127.628
Mobile & Ohio Railroad Company	38.693
Cumberland Railroad Company	12.90
Cumberland Railway Company	1.74
	180.961
Trackage rights over other railroads	38.919
Total mileage	219.88

16. The Southern Railway Company of Virginia, during the years involved, owned, operated, leased and controlled the following mileage:

1914	9,395.82 miles
1915	9,523.15 miles
1916	9,522.79 miles

17. During each of the years involved, the Southern Railway Company in Kentucky, Cumberland Railroad Company, Cumberland Railway Company and the Mobile & Ohio Railroad Company, by their respective officers, or during Federal control by the officers of the Director General, filed with the State Railroad Commission, State Board of Valuation and Assessment, and the Tax Commissioner of Kentucky, full reports showing the results of all of the operations, etc., of the respective road as required by Statutes; and each Company paid the full tax assessed on its tangible and intangible property.

18. For the years, 1914, 1915 and 1916, the property of all railroads in the State of Kentucky was equalized at sixty per cent of its value.

19. In its report to the Kentucky Railroad Commission for each of the years in question, the following question and answer thereto appears in the reports made by the Southern Railway Company in Kentucky:

"2. Did any corporation or corporations, transportation or other, hold control over the respondent at the close of the year?

[fol. 41] "Ans. This Company is advised that Southern Railway Company controls this Company through the ownership of its entire capital stock."

Substantially the same answers were made by the Cumberland Railway Company and Cumberland Railroad Company. The Mobile & Ohio Railroad Company reported substantially the same, except that the control was affected by the ownership of a large majority of its capital stock.

20. The incorporators of the Southern Railway Company in Kentucky were:

Samuel Spencer,
Charles H. Coster,
Alexander B. Andrews,
Francis Lynde Stetson,
William A. C. Ewen,
William H. Baldwin, Jr.

Samuel Spencer was the President of the defendant, The Southern Railway Company. The money paid for the property was furnished by the defendant and it caused the organization of the corporation.

21. At all the stations of the Southern Railway Company in Kentucky the bulletin boards have at the head of them in large capital letters these words "Southern Railway System." The same sign is on the windows of the office building in Louisville and over the door are these words: "Southern Railway Company in Kentucky, Incorporated." The Treasurer's office of the Southern Railway Company in Kentucky is kept in Washington in the same building and by the same men as the Southern Railway Company in Virginia.

22. For each of the years involved, the amount paid by all of the railroads in the State of Kentucky for taxes was deducted by the Board of Valuations and Assessment or Tax Commissioner from the income of such railroads before the said income was capitalized for the purpose of arriving at the franchise tax.

W. D. Jesse, Hazelrigg & Hazelrigg, Hobson & Hobson, L. W. Morris, Attorneys for Plaintiff.
Humphrey, Crawford & Hulette, Wallace & Harriss, Attorneys for Defendant.

Southern Railway Company in Kentucky

Articles of Incorporation, Dated August 17, 1894

Southern Railway Company in Kentucky, Articles of Incorporation, August 17, 1894

We, the undersigned, to-wit; Charles H. Coster, a purchasing committee, hereinafter called the Purchaser, who did purchase the railroad and other property of the Louisville Southern Railroad Company at a sale thereof held in the City of Louisville Kentucky, on the 16th day of August, 1894, under a decree of foreclosure and sale entered on the 11th day of June, 1894, and amended June 21, 1894, in a certain suit in equity pending in the Circuit Court of the United States of America for the District of Kentucky, wherein the Central Trust Company of New York and others were complainants and the Louisville Southern Railroad Company, a corporation created by and existing under the laws of the State of Kentucky, was defendant, in which suit it was sought to foreclose the mortgage dated the 1st day of July, in the year 1890, and upon or about that day duly executed, acknowledged and delivered by the said Louisville Southern Railroad Company to said Central Trust Company of New York, and in which suit it was undertaken to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said Louisville Southern Railroad Company, and the said purchasing Committee having at the time of said purchase declared, and the said Court having subsequently ordered and decreed, that the said sale should be for the benefit of a corporation thereafter to be formed under the laws of Kentucky by the name of the "Southern Railway Company in Kentucky," and the said purchasing committee having paid for the said railroad property sold under the said judgment decree the sum of one million dollars ($1,000,000), of which twenty thousand dollars ($20,000) was paid in cash to the Special Master making the sale, and the remainder thereof, to-wit nine hundred and eighty thousand dollars ($980,000) has been paid by delivering to the Special Master, for proper endorsement thereon of partial payment, bonds of the Louisville Southern Railway Company secured by said mortgage, to the amount of four million two hundred ninety-nine thousand five hundred dollars ($4,290,500) and the said Court having ordered and decreed the Special Master, Edmund T. Halsey, as further evidence of such sale and purchase, to execute and deliver a deed and conveyance to the said Southern Railway Company in Kentucky, accepted as purchaser in said proceedings, of all the railroad property described in said judgment decree, to-wit:

All and singular the rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property, of every description, whether real, personal or [fol. 43] mixed, embraced or included in said decree of sale and the sale pursuant thereto, that is to say:

All and singular the railroad of the said Louisville Southern Railroad Company, beginning at a point on Magnolia Avenue, between Eleventh and Twelfth streets, in the City of Louisville, and extending thence through the Counties of Jefferson, Shelby, Anderson, and Mercer, via Shelbyville, Lawrenceburg, and Harrodsburg, to Burgin, in Mercer County, on the Cincinnati Southern Railroad, and extending from Lawrenceburg through Versailles in Woodford County to Lexington in Fayette County, and also to Georgetown in Scott County, including all rights of way, roadbed, rails, bridges, railroad tracks, switches, side tracks, turntables, lands, depots, station houses, round houses, machine shops, buildings and structures of every sort, with all other things which are part of, connected with or appurtenant to said railroad as above described and all locomotives, engines, tenders, cars, carriages, tools, machinery, rolling stock and equipment; also, the full benefit of certain contracts between the Louisville Southern Railroad Company and the Kentucky and Indiana Bridge Company, and the Newport News and Mississippi Valley Railroad Company, mentioned in said decree together with all rights and privileges existing thereunder for and during the full term thereof; also certain depot grounds and buildings at Thirteenth and High streets, and the eight-acre tract adjoining the Kentucky and Indiana Bridge Company's yards described in said decree; also, all property, franchises, rights, powers, privileges and immunities belonging or appurtenant to said Louisville Southern Railroad Company, and all tools, incomes, issues and profits arising out of or to be derived from the above-described mortgaged premises, and all the right, title, interest and estate, either legal or equitable, of the Louisville Southern Railroad Company in and to said mortgaged premises, excepting, however, any extention of said railroad beyond either of the terminal points herein mentioned, to-wit, Louisville, Burgin, Lexington, and Georgetown, and any branch or branches constructed from said railroad, as the same existed at the date of the mortgage mentioned in said decree, to-wit, July 1, 1890, and all rolling stock or equipment expressly purchased by reason and for the use of such extension or of such branch or branches.

A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 11th of June, 1894, to which reference is hereby made.

Together with all the corporate rights, privileges, immunities and franchises of said Louisville Southern Railroad Company, and all the tools, fares, freights, rents, incomes, issues and profits of said railroad, and all interest and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold at any time owned or acquired by and now in possession of, said [fol. 44] Louisville Southern Railroad Company, or Samuel Spencer and Henry Fink, or either of them as receivers thereof.

And we whose names are also hereto subscribed, to-wit, Samuel Spencer, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt, and William H. Baldwin, Jr., hereinafter called Associates, whom such purchaser has associated with him in this organization of a new corporation pursuant to the laws of Kentucky,

Do hereby join in executing these Articles of Incorporation, and do hereby certify, specify, and declare that we have associated to form a corporation for the purpose of purchasing, owning, constructing, operating and maintaining the railroad hereinbefore described; and we do further certify:

First. The name of the corporation shall be the Southern Railway Company in Kentucky.

Second. The name of the city and county in which its principal office or place of business is to be located is the City of Louisville, in the County of Jefferson.

Third. The nature of the business or objects or purposes proposed to be transacted, promoted or carried on is that of owning, operating and maintaining the railroad above described, with such extensions and branches thereof as may from time to time be constructed or acquired in accordance with law.

Fourth. The amount of capital stock is one million dollars ($1,000,000) and the number of shares into which the same shall be divided is ten thousand shares of the par value of one hundred dollars ($100) each. All such capital stock having been issued to such purchaser and associates as fully-paid stock in part consideration of the transfer to the corporation hereby formed of the property so sold as aforesaid.

Fifth. The name and place of residence of each of its stockholders is as follows: Samuel Spencer, New York, N. Y.; Charles H. Coster, New York, N. Y.; Alexander B. Andrews, Raleigh, N. C.; Francis Lynde Stetson, New York, N. Y.; William A. C. Ewen, Dobbs Ferry, N. Y.; Thomas W. Bullitt, Louisville, Ky.; William H. Baldwin, Jr., Washington, D. C.

Sixth. The time when said corporation is to commence is the date of the filing of these articles, and it is to continue in perpetuity.

Seventh. The affairs of the Corporation are to be conducted by five directors, who shall hold office until the first meeting of the stockholders of the company to be held; and the names of the first Board of Directors shall be Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, William H. Baldwin, Jr. The first annual election of directors shall be held at Louisville on the first Monday of August, 1895.

[fol. 45] Eighth. The highest amount of indebtedness or liability which the corporation may at any time incur is ten million dollars ($10,000,000).

Ninth. The private property of the stockholders is not subject, under any circumstances, to the payment of the debts of the corporation.

Tenth. The places from and to which, and the name of each County into *ot* through which the said railroad is now constructed and is intended to be operated, are hereinbefore truly set forth. Its length, as near as may be, is one hundred and thirty and five-tenths (130.5) miles.

In witness whereof, we have executed, signed and acknowledged these Articles this seventeenth day of August, 1894.

—— ——, Purchaser. —— ——, Associate*a*.

Witness: —— ——:

State of ——,
County of ——:

I, —— ——, do hereby certify that the foregoing instrument in writing, or Articles of Incorporation, were this day produced to me by the parties and were severally acknowledged by the said Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt and William H. Baldwin, Jr., to be their act and deed.

My commission expires —— —, ——.

Given under my hand and seal of office this — day of August, 1894.

[File endorsement omitted.]

Judgment omitted; printed side page 34 ante.

[Caption omitted]

IN COUNTY COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS, Sheriff of Woodford County, Kentucky, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY and WALKER D. HINES, Director General, Defendants

JUDGMENT—Filed Sept. 29, 1920

Came the parties and filed stipulations and by consent these two cases are heard together and the cases being submitted to the Court and the Court being advised it is [fol. 46] adjudged by the Court that the plaintiff's petitions be dismissed and that plaintiff take nothing thereby to all of which plaintiff excepts and prays an Appeal which is granted.

A true Copy. Attest:
R. H. Gray, Clerk Woodford County Court, by Jno. M. Gray, D. C.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

PETITION—Filed Mar. 8, 1920

The plaintiff, Commonwealth of Kentucky states that Robert Hawkins is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky. The defendant, Southern Railway Company is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky and other counties of this state as well as other states in the Union. During the year ended June 30, 1917 said defendant operated, owned, leased and controlled various lines of Railroad in Kentucky and elsewhere; and under the Kentucky Statutes made and provided, was liable for the payment of a franchise tax thereon, for the taxing of 1918.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for said year to file a report with the Auditor of Public Accounts before October 1st thereof showing the name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock; preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest or investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind if tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; also the gross and net income or earn- [fol. 47] ings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June in the year in which the assessment is required to be made.

Said defendant, Southern Railway Company failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Southern Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky, reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of $2,137,072, as the true and total value of its property in this State. A copy of said report is filed as part hereof marked No. 13. The length of the lines of the Southern Railway Company in Kentucky within this State for said year was 160.45 miles.

The Mobile & Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by the said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of $1,243,926, as a true and total value of its property in the State. A copy of said report is filed herewith marked No. 14. The length of lines of said Mobile & Ohio Railroads Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation, duly organised under the laws of the State of Kentucky, with like powers as a common carrier. At all times herein mentioned defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railraod Company reporting only the length of lines operated by it and its property and earnings for said years, and as assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of $103,380, as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 15. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the [fol. 48] lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of $15,675, as the true and total value of its property in the State. A copy of said report is filed as part hereof marked No. 16. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles for said year.

No report was filed or assessment made in any way, or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentioned, operated, owned, leased and controlled the lines of the four said sub*is*diary co*n*panies and well knew its duties as herein above set out; and said defenda-t filed said reports in the manner and form alleged for the purpose of concealing its property in this state and escaping taxation; and did thereby conceal a portion of the defendant's property in Kentucky to be omitted from assessment: to-wit, the franchise of the said defendant. No part of said franchise was assessed for taxation in said year and all of same was om*m*itted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four subsidiary corporations, for said year was 219.88 miles, and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant in fact operated, owned, leased and controlled in this state for said year the said 219.88 miles and same were a part of its total system *i*f rail*ao*ds extending into the various states of said Union. Both in and outside of this state, said defendant for said year operated, owned, leased, and controlled 9,251.42 miles of railroad; and said mileage wholly within this state amounted to 2.5% thereof. The net earnings or income of said defendant for said year were $45,312,000.00. Said net income or earnings when capitalized at 6% amount to $755,200,000.00, which sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year. For said year there was within this state 2.5% of said whole property, or $18,880,000.00. The total value of the property of said defendant, Southern Railway Company, for said year in this State was $18,880,000.00 said defendant in the name of said subsidiary corporations paid taxes in Kentucky on $3,500,053.00 being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of the defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1918*m* was of value $15,379,947.00 and taxes on said sum are now just, due and unpaid.

The defendant, Walker D. Hines, or his predecessor in office, was at all times herein mentioned the duly appointed, qualified and acting Director General of Rail*ao*ds. Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to twenty (20%) per centum penalty on all state [fol. 49] and county taxes colle-d in this action.

Wherefore, the plaintiff prays that the omitted portion of the franchise of the defendants as hereinbefore set out, be assessed for taxation, for the year 1918, and certified to the Auditor of Public Accounts for collection on behalf of the state tax, and for certification and apportionment to the various collecting officers of the Counties in or through which said company operated its railroad, to-wit: Anderson, Ballard, Bell, Boyle, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley, and Woodford. The relator herein be adjudged entitled to his commission of twenty per cent penalty against the defendants on the various accounts respectively due the State and each of said counties; that defendant be required to answer the interrogatories hereto annexed and further prays for his costs and all proper relief.

Paragraph Two

The plaintiff, Commonwealth of Kentucky, states that Robert Hawkins, is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky. The defendant Douther Railway Company is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky and other counties of this state as well as other states in the Union. During the year ended December 31st, 1913, said defendant operated, owned, leased and controlled various lines of railroad in Kentucky and elsewhere; and under the Kentucky Statutes made and provided, was liable for the payment of a franchise tax thereon, for taxing year of 1919.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for said year to file a report with the Auditor of Public Accounts before March thirty-first thereof showing the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock; preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thir-y-first day of December of the year in which the statement is required to be made; the amount of usrplus funds and undivided profits and the value of all other assets, the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest or investments, and incomes from all other sources for twelve months next preceding the thirty-first day of December of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary [fol. 50] sale; also the gross and net income or earnings received in this state and out of this state, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirty-first day of December of the year which the assessment is required to be made.

Said defendant, Southern Railway Company failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Southern Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky, reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of $2,139,072 as the true and total value of its property in this State. A copy of said report is filed as part hereof marked No. 17. The length of the lines of said Southern Railway Company in Kentucky within this State for said year was 160.45 miles.

The Mobile & Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its eranings for said year. An assessment was made against it of its property and franchise so reported in the sum of $1,242,385 as the true and total value of its property in the State. A copy of said report is here filed as marked No. 18. The length of lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation, duly organized under the laws of the State of Kentucky, with like powers as a common carrier. At all times herein mentioned defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company, of its property and franchise in the sum of $103,380 as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 19. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with the power to act as a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise [fol. 51] so reported in the sum of $15,675 as the true and total value of its property in the State. A copy of said report is filed as part hereof marked No. 20. The length of the lines of the Cumberland Railway Company in Kentucky was 209 miles for said year.

No report was filed or assessment made in any way or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the name of the four subsidiary companies. Said defendant at all times mentioned, operated, leased and controlled the lines of the four said subsidiary compamies and well knew its duties as herein above set out; and said defendant filed said reports in the manner and rorm alleged for the purpose of concealing its property in this State and escaping taxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to ne ommitted from assessment; to-wit, the franchise of the said defendant. No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four subsidiary corporations, for said year was 219.88 miles; and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant in fact operated, owned, leased and controlled in this State for said year the said 219.88 miles and same were a part of its total system of railraod extending into the various states of said Union. Both in and outside of this State, said defendant for said year operated, owned, leased and controlled 9,251.42 miles of railroad; and said mileage wholly within this State amounted to 2.5% thereof. The net earnings or income of said defendant for said year were $43,865,000.00. Said net income or earnings when capitalized at 6% amount to $731,083,000.00, which last mentioned sum is the true and total value of the whole property of said defendant, both in and out of Kentucky for said year. For said year there was within this State 2.5% of said whole property or $18,277,175.00. The total value of the property of said defendant, Southern Railway Company, for said year, in this State was $18,277,075.00 said devendant in the name of said subsidiary corporations paid taxes in Kentucky on $3,500,512.00, being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1919, was of value $15,776,563.00 and taxes on said sum are now just, due and unpaid.

The defendant, Walker D. Hines, or his predecessor in office, was at all times herein mentioned the only appointed, qualified and acting Director General of Railroads, Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to twenty (20%) per centum penalty on all state and county taxes collected in this action.

Wherefore, The plaintiff prays that the omitted portion [fol. 52] of the franchise of the defendants as hereinbefore set out, be assessed for taxation, for the year 1919, and certified to the Auditor of Public Accounts for collection on behalf of the State tax, and for certification and apportionment to the various collecting officers of the counties in or through which said company operated its railroad, to-wit: Anderson, Ballard, Bell, Boyle Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley, and Woodford. That relator herein be adjudged entitled to his commission of twenty per cent penalty against the defendants on the various accounts respectively due the state and each of said counties; that defendants be required to answer the interrogatories hereto annexed and further prays for his costs and all proper relief.

Hazelrigg & Hazelrigg, L. M. Morris, Hobson & Hobson, Will D. Jesse, County Attorney, Attorneys for Plaintiff.

IN COUNTY COURT OF WOODFORD COUNTY

INTERROGATORIES—Filed Mar. 8, 1920

I. In the Statistics of Railways in the United States compiled by the Interstate Commeree Commission for the year ended June 30, 1913, opposite the name of the "Southern Railway in Kentucky" are these words: "Merged in Souther- Railway Company. July 1, 1912." Is that statement true? And if so, what change, if any, has been made since and when?

II. The defendant*s* company will answer the following interrogatories for the year ended June 30, 1917.

1. What was the total mileage of railroad lines which were operated, owned, leased and controlled by the ownership of a majority of the capital stock?

2. What were the names of the railways which were owned, operated, leased and controlled by the defendant company? Give the length of each line, including the lines operated in other names but of which defendant company owned a majority of the capital stock.

3. Which of the roads listed in answer to the following question reported to the Interstate Commerce Commission as operating railways?

4. How much of the mileage disclosed in the answer to question two, was within Kentucky; and what lines within Kentucky did defendant company control by owning a majority of the capital stock of the corporation in whose name it was operated?

5. Give the name of each county in Kentucky and the number of miles of railroad therein which defendant company or the "Southern Railway Company in Kentucky" or Mobile & Ohio *T*ailroad, or Cumberland Railroad, or Cumberland Railway operated?

[fol. 53] 6. Did any other company listed in answer to question two above operate within Kentucky? If so, which of them and give the counties in which operations were carried on and mileage therein.

7. What was the total of the railway operating revenues for each of the roads listed in the answer to question two above?

8. What was the total railway operating expenses for each of said roads.

9. What were the total railway tax accruals for each of said raods?

10. What was the total non-operating income for each of said roads?

11. What further amounts of money were deducted from incomes of each of said roads to determine the profit and loss for said year? Give general classification and amount.

12. Explain briefly the nature of each of these deductions- that is explain what the deductions represent or the nature of the expense.

13. Name the officers and directors of the "Southern Railway in Kentucky" and state what relation, if any, each of them bore to defendant company.

14. Name the officers and directors of the Mobile & Ohio Railroad and state what relation, if any, each of them bore to Defendant company.

15. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant Company.

16. Name the officers and directors of the Cumberland railway and state what relation, if any, each of them bore to defendant company.

17. Explain the relationship between the Southern Railway Company (corporate) and the Southern Railroad (Federal) with regard to income, expenses, taxes, accounting; and mileage operated.

18. What interest if any, did the defendant, Southern Railway Company, or any one or more of its subsidiaries have in the capital stock, management, directorate or control of the Cincinnati New Orleans and Texas Pacific Railway Company? Did defendant or any one or more of its subsidiaries operate, own, lease or control same?

III. The defendant will answer each of the above eighteen interrogatories for the year ending December 31, 1918.

Said Statement and Interrogatories are endorsed as follows; Filed March 8th. 1920. Attest R. H. Gray, Clerk. Summons & 2 Copies Woodford Co. Summons & 1 copy to Jefferson Co. 3/15/20.

[fol. 54] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

ORDER REVIVING CAUSE AGAINST JOHN BARTON PAYNE—May 24, 1920

Comes plaintiff and filed amended statement making John Barton Payne as Agent of the President of the United States under the Transportation Act of Congress of February 28, 1920, defendant herein, and it is ordered that this action be revived against said John Barton Payne as such Agent, and process is awarded against him, and this cause is contin-ed.

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED STATEMENT MAKING JOHN BARTON PAYNE DEFENDANT—Filed May 24, 1920

Plaintiff amends its statement herein and says that the term of Walker D. Hines as Director General of Railroads has expired, that thereafter he was made agent of the President of the United States under the Transportation Act of Congress of February 28, 1920 and has since resigned as such and that John Barton Payne has been appointed as such agent of the President of the United States under the Transportation Act and is now such agent.

Plaintiff makes said John Barton Payne as agent of the President of the United States under the Transportation Act of Congress of February 28, 1920, Sec. 206 a defendant hereto and prays process and for judgment as prayed in its Statement and all proper relief.

W. D. Jesse, Hazelrigg & Hazelrigg, L. W. Morris,
Hobson & Hobson, for Plaintiff.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED STATEMENT—Filed June 10, 1920

Plaintiff amends its statement and says that John Barton Payne is Director General of Railroads and agent under Section 206 of the Transportation Act of 1920. Plaintiff makes John Barton Payne, Director General of Railroads, as agent under Section 206 of the Transportation Act of [fol. 55] 1920 defendant hereto and prays process and for judgment as in its statement and for all proper relief.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

MINUTE ENTRIES

This day came the defendant, Southern Railway Company and filed its demurrer to the Statement of the Plaintiff Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford County, Kentucky; and also came the defendant, John Barton Payne, Director General of Railroads as Agent under Section 206 of the Transportation Act of 1920, and filed his demurrer to the statement of said plaintiff.

Without waiving said demurrers but expressly replying thereon, said defendants filed their answer herein.

Thereupon came the plaintiff and filed its reply to said answer: and it is agreed that the affirmative allegations may be abd they are hereby by the defendant traversed of record.

IN COUNTY COURT OF WOODFORD COUNTY

ORDER FILING STOCKHOLDERS' REPORT—June 28, 1920

Came Plaintiff and tendered and moved to file herein as evidence the stockholders reports for the years 1917 and 1918 issued by the defendant, to which the defendants objected, and the motion is submitted to the Court, and the Court being advised said objections are overruled and said reports are ordered to be and they are hereby filed, to which ruling of the Court as to each report the defendants object and except, and this case is continued.

Said Order is endorsed as follows, to-wit: "Entered in Order Book No. 4 page 542.

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

DEMURRER—Filed June 28, 1920

The defendant, Southern Railway Company, demurs to the Statement of the plaintiff, Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford [fol. 56] County, because the same does not state facts sufficient to support or constitute cause of action against it.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attys. for Deft. Southern Ry. Co.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

DEMURRER OF JOHN BARTON PAYNE—Filed June 28, 1920

The defendant, John Barton Payne, Director General of Railroads as Agent of Section 206 of the Transportation Act of 1920, demurs to the statement of the plaintiff, Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford County, because the same does not state facts sufficient to support or constitute a cause of action against him.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attys. for Deft. John Barton Payne, Director General of Railroads, etc.

Exhibit A for 1918 is in words and figures as follows, to-wit:

Mileage Statistics

Owned, Leased, and Controlled by Southern Railway Company Operated by United States Railroad Administration, 1918

Owned:

Southern Railway Company		4,213.96

Leased:

Southern Railway—Carolina Division	755.12	
Virginia & Southwestern Railway	188.96	
Elberton Southern Railway	50.60	
Mobile & Birmingham Railroad	150.35	
Richmond & Mecklenburg Railroad	31.30	
Georgia & Midland Railway	97.88	
Memphis-Chattanooga Railway	2.83	
North Carolina Midland Railroad	225.95	
Atlanta & Charlotte Air Line Railway	263.08	
Atlantic & Danville Railway	277.71	
North & South Carolina Railroad	3.73	
Lockhart Railroad	13.81	
Wooldridge-Jellico Coal Co.	1.75	
		2,116.59

[fol. 57] Operated under Agreement:

Southern Railway Company in Mississippi		11.40
Trackage Rights		517.50

Controlled by Ownership of Stock:

State University Railroad	10.20	
Sievern & Knoxville Railroad	17.44	

Ensley Southern Railway	33.42	
Roswell Railroad	12.55	
Cumberland Railway	11.21	
Tennessee & Carolina Southern Railway	29.89	
Southern Railway in Kentucky	127.64	
The Alabama Great Southern Railroad Co.	312.27	
Atlantic & Yadkin Railway Co.	163.10	
Asheville & Craggy Mountain Railway Co.	4.44	
Blue Ridge Railway Co.	44.00	
Cumberland Railroad Co.	12.90	
Carolina & Tennessee Southern Railway Co.	13.90	
Danville & Western Railway Co.	80.78	
Georgia Southern & Florida Railway Co.	402.05	
Hartwell Railway Company	10.10	
High Point, Randleman, Ashboro & Southern	27.98	
Mobile & Ohio Railroad Company	991.05	
New Orleans & North Eastern	214.73	
Northern Alabama Railway Company	112.50	
Tallulah Falls Railway Co.	58.00	
Yadkin Railroad Company	52.23	
		2,742.38
		9,601.83

Exhibit B for 1918 is in words and figures as follows to-wit (two sheets):

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

ANSWER—Filed June 28, 1920

The defendants, Southern Railroad Company and John Barton Payne, Director General of Railroads, acting as agent under Section 206 of the Transportation Act of 1920, answering the statement filed herein, state that under the Acts of Congress duly passed the Government of the United States took and held possession of and operated, for the whole of the years 1918 and 1919, all of the railroads [fol. 58] and railroad property owned, operated, leased or controlled by the Southern Railroad Company.

The defendants deny that it was the duty of these defendants or of either of them, for the taxing year mentioned in the first paragraph of the statement, viz., 1918, to file any report to the Auditor of Public Accounts, of any kind, or of the kind mentioned in the Statement, except in so far as it was the duty of the Director General to file the reports for the four railroads named in the Statement as having lines in Kentucky, and for railroads in no way involved herein.

Defendants deny that they or either of them had or exercised any franchise whatever in the State of Kentucky except franchises belonging to the said four railroads, and, as to the Director General, franchises for railroads in no way involved herein. Defendants state that the Director General operated each of said four railroads under the franchises of the respective roads, and a report was filed on behalf of the Director General for each of said roads, with the proper authorities of the State of Kentucky.

Defendants deny that the Southern Railway Company operated or owned any of the lines of the said four subsidiary companies; deny that either of the defendants was under any duty whatever to file any report other than the reports which were filed and which *and* referred to in plaintiff's Statement. Defendants deny that said reports were filed for the purpose of concealing any property of either or for the purpose of escaping taxation on any property of either of these defendants in this state, and they deny that either of them did thereby conceal any property or cause any property to be omitted from assessment, and deny that the franchises of the Southern Railway Company were subject in any way to assessment in Kentucky.

Defendants say that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the names of the persons who were elected directors. Defendants admit that said defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares. As to the Cumberland Railroad Company, defendants say that during the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendants say that there was outstanding in the name of its directors, during the period in controversy, a sufficient quantity of its capital stock to qualify them as such.

Defendants deny that any of said miles of railroad belonging to the said four companies were at any time a part of the general system of the defendant, Southern Railway Company, extending into various states of the Union, except as to the fact, which is admitted, that said Southern Railway Company owned a majority of the stock in each of said separate corporations: Southern Railway Company [fol. 59] in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; and the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

Defendants state that none of the property above described was in any way omitted from assessment by the State of Kentucky; and they deny that any property or any franchise was omitted from assessment.

The total mileage of the defendant, Southern Railway Company, for the period stated in the first paragraph of the Statement, was 9,761.36 miles; and the mileage of the lines mentioned in the said first paragraph of the Statement was 219.88 miles; so that the proportion of the mileage of the said four railroads in Kentucky to the total mileage of said defendant, Southern Railway Company, owned, operated, leased and controlled, was 2.252 per cent.

Defendants deny that the net earnings or income of the defendant, Southern Railway Company, including interest and dividends received from securities held by it, for said year, was the amount set forth in the first paragraph of the Statement, or anything more than $25,043,853.67. Defendants state that this sum capitalized at 7 per cent would amount to $357,769,338.10.

Defendants will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the first paragraph of the Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the paragraphs of the Statement.

Defendants deny that the amount set out in the Statement was the true total value of the whole property of the defendant, Southern Railway Company, in and out of Kentucky, for said year, or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendants now deny that any portion of said defendant Southern Railway Company's property in Kentucky was omitted from assessment for the year 1918, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 2

In answer to the second paragraph of said Statement the defendants state that under the Acts of Congress duly passed the Government of the United States took and held possession of and operated, for the whole of the years 1918 and 1919, all of the railroads and railroad property owned, operated, leased or controlled by the Southern Railway Company.

The defendants deny that it was the duty of these defendant*a* or of either of them, for the taxing year mentioned in [fol. 60] the second paragraph of the Statement, viz., 1919, to file any report to the Auditor of Public Accounts, of any kind, or of the kind mentioned in the statement, except insofar as it was the duty of the Director General to file the reports for the four railroads named in the Statement as having lines in Kentucky, and for railroads in no way involved herein.

Defendants deny that they either of them had or exercised any franchise whatever in the State of Kentucky except franchises belonging to the said four railroads, and, as to the Director General, franchises for railroads in no way involved herein. Defendants state that the Director General operated each of said four railroads under the franchises of the respective roads, and a report was filed on behalf of the Director General for each of said roads, with the proper authorities of the State of Kentucky.

Defendants deny that the Southern Railway Company operated or owned any of the lines of the said four subsidiary companies; deny that either of the defendants was under any duty whatever to file any report other than the reports which were filed and which are referred to in plaintiff's Statement. Defendants deny that said reports filed for the purpose of concealing any property or for the purpose of escaping taxation on any property of either of these defendants in this State, and they deny that either of them did thereby conceal any property or cause any property to be omitted from assessment, and deny that the franchises of the Southern Railway Company were subject in any way to assessment in Kentucky.

Defendants say that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the names of the persons who — elected directors. Defendants admit that said defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares.

As to the Cumberland Railroad Company, defendants say that during the period in controversy there was outstanding in the names of the directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendants say that during the period in controversy there was outstanding in the name of its directors a sufficient quantity of its capital stock to qualify them as such.

Defendants deny that any of said miles of railroad belonging to the said four companies were at any time a part of the general sustem of the defendant, Southern Railway Company, extending into various States of the Union, except as to the fact, which is admitted, that said Southern Railway Company owned a majority of the stock in each of said seperate corporations: Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; and the Cumberland Rail-

[fol. 61] way Company, a corporation organized and existing under the laws of the State of Tennessee.

Defendants state that none of the property above described was in any way omitted from assessment by the State of Kentucky; and they deny that any property or any franchise was omitted from assessment.

The total mileage of the defendant, Southern Railway Company, for the period stated in the second paragraph of the Statement, was 9601.83 miles; and the mileage of the lines mentioned in the said second paragraph of the Statement was 219.88 miles—so that the proportion of the mileage of the said four railroads in Kentucky to the total mileage of said defendant, Southern Railway Company, owned, operated, leased and controlled, was 2.289 per cent.

Defendants deny that the net earnings or income of the defendant, Southern Railway Company, including interest and dividends received from securities held by it, for said year, was the amount set forth in the second paragraph of the Statement, or anything more than $30,435,314.39. Defendants state that this sum capitalized at 7 per cent would amount to $434,833,062.71.

Defendants state that in subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the second paragraph of the Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the paragraphs of the Statement.

Defendants deny that the amount set out in the stateme[illegible] was the true total value of the whole property of the d[illegible]fendant, Southern Railway Company, in and out of Kentucky, for said year, or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendants now deny that any portion of said defendant Southern Railway Company's property in Kentucky was omitted from assessment for the year 1919, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 3

Further answering, these defendants say that for the taxing years 1918 and 1919 dealt with in the Statement herein, the assessing authorities of the State of Kentucky—The State Tax Commission—have uniformly established and acted upon a rule of ascertaining the value of the franchise of railroad companies subject to assessments in Kentucky, which was applied to all of said railroads. This rule was to ascertain the net earnings of the said railroad company, taxes being deducted, and then to capitalize these net earnings at 7 per cent, and then to take 70 per cent of the amount thus arrived at, and to fix the amount thus determined as the value of the capital stock of said railroad. And this was the method uniformly applied by said assessing authorities of the State of Kentucky as aforesaid during the [fol. 62] periods mentioned in the statement to which this answer is a response.

The defendants further say that for each of the taxing years mentioned in the Statement herein local assessors and other assessing officers of the State of Kentucky assessed the property of individuals and of corporations within their property, of duty, comprising 80 per cent of the total taxable property, at not exceeding 60 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale; that the fact of such systematic assessment upon that basis annually has been a matter of public notoriety in the State; that notwithstanding this the said Tax Commissioner has adopted a method which resulted in an assessment of railroad tangible and intangible property at 70 per cent of its fair cash value.

The defendants say that having ascertained the value of the capital stock of the railroads in this State subject to assessment by the above described method the taxing authorities ascertained the total mileage of all lines owned, operated, leased and controlled by said several companies, and assigned to Kentucky that proportion of the thus ascertained value of the capital stock of the lines owned, operated, leased and controlled, that the said lines in Kentucky bore to the total length of said lines. From this value of the capital stock so ascertained there was deducted the tan-ible property of said several railroads assessed in Kentucky.

Defendants say that it would be a violation of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment thereof, for this Court to adopt any method in making an assessment herein (if any could be made) on a less favorable basis to defendants than the one above described.

Paragraph 4

And the defendants further say that in none of said periods did the defendant, Southern Railway Company, have any tangible property in the State of Kentucky; that it had no intangible property in the State of Kentucky during said periods; that if the Court should be of opinion, under all the facts and circumstances of this case, that the property in Kentucky, tangible and intangible, of the four railroads mentioned in the statement herein should be assessed against these defendants, or either of them, then these defendants say that this assessment has already been made by the State Tax Commission for each of said years; that is to say, the tangible property of each of said corporations has been assessed; the ~~value~~ of the capital stock of each of said corporations has been ascertained; the total value of the tangible and intangible property of each of said companies has been ascertained and all the taxes paid thereon; that in order that the value of the capital stock of these four corporations assignable to Kentucky should be determined the said taxing authorities have taken into consideration all the facts necessary to that end, and have fixed the value of the tangible property and of the franchise of each of said corporations as aforesaid.

[fol. 63] Defendants further say that as contributing to the earnings of the defendant, Southern Railway Company, and to the value of its capital stock, said Railway Company owned, and said Director General operated, in states other than Kentucky, during said several years, many miles of double track, that is, as of December 31, 1917, 656.43 miles; as of December 31, 1918, 715.86 miles; whereas all the lines in Kentucky of the corporations mentioned in the statement herein were single track; that this double track milage cost a very large sum and contributed very largely to the earnings of the property; that besides this, the said defendant had at various points on its line very expensive, costly and valuable terminals and machine shops, such as at Spencer, North Carolina, Knoxville, Tennessee, Atlanta, Georgia, and other points; that none of the railroads mentioned in the statement herein had in Kentucky valuable property of this character.

Defendants say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the Fourteenth Amendment thereof.

And so it is that these defendants say that if the Court should hold that the Southern Railway Company is subject to any assessment in this State by reason of any ownership, operation, lease or control of the properties of any or all of the lines of railroad mentioned herein, then all values inherent therein, either tangible or intangible, have already been assessed by the proper assessing officers of the State of Kentucky, and to attempt to add to that assessment would be a violation of the Constitution of the State of Kentucky and the Constitution of the United States, particularly the Fourteenth Amendment thereof; and the defendants pray that this suit may be dismissed, and for all proper relief.

Wallace & Harriss, Humphrey, Crawford & Middleton, Attorneys for Defendants.

IN COUNTY COURT OF WOODFORD COUNTY

Southern Railway Company & Director General U. S. R. R. Adm.

ANSWERS TO INTERROGATORIES—Filed June 28, 1920

✓ Q. 1. What was the total mileage of railway lines which were owned, operated, leased and controlled by defendant company; including lines controlled by the ownership of a majority of the capital stock?

A. 1917, 9,761.36 miles; 1918, 9,601.83 miles.

Q. 2. What were the names of the railroads which were owned, operated, leased and controlled by defendant com- [fol. 64] pany? Give the length of each line, including the lines operated in the name of defendant company; and those operated in other names but of which defendant company owned a majority of the capital stock.

A. See Exhibit A for 1917 and A for 1918.

Q. 3. Which of the roads listed in answer to the foregoing question reported to the Interstate Commerce Commission as operating railways?

A. —

1917	1918—Federal Operation#
The A. G. S. R. R. Co.	The A. G. S. R. R. Co.
Atlantic & Yadkin Ry. Co.	Atlantic & Yadkin Ry. Co.
Asheville & Craggy Mtn.	Asheville & Craggy Mtn.
Blue Ridge Ry. Co.	Blue Ridge Ry. Co.
Cumberland R. R. Co.	
Carolina & Tenn. Southern.	Carolina & Tenn. Southern.
Danville & Western Ry. Co.	Danville & Western Ry. Co.
Ga. Sou. & Fla. Ry. Co.	Ga. Sou. & Fla. Ry. Co.
Hartwell Ry. Co.	Hartwell Ry. Co.
High Point, Randleman, Ashboro & Sou.	High Point, Randleman, Ashboro and Sou.
Mobile & Ohio R. R. Co.	Mobile & Ohio R. R. Co.
New Orleans & Northeastern R. R. Co.	New Orleans & Northeastern R. R. Co.
Northern Ala. Ry. Co.	Northern Ala. Ry. Co.
Tallulah Falls Ry. Co.	Tallulah Falls Ry. Co.
Yadkin R. R. Co.	Yadkin R. R. Co.
Sou. Railway Co.	Sou. Railway Co.

Q. 4. a. How much of the mileage disclosed in the answer to question two was within Kentucky; and

b. What lines within Kentucky did defendant company control by owning a majority of the capital stock of the corporation in whose name it was operated.

A. a. 1917, 187.07 miles; 1918, 187.07 miles.

b. 1917 and 1918, Southern Ry. Co. in Ky., Cumberland R. R., Cumberland Ry., Mobile & Ohio.

Q. 5. Give the names of each county in Kentucky and the number of miles of railroad therein which defendant company or the "Southern Railway Company of Kentucky," or Mobile & Ohio Railroad, or Cumberland Railroad, or Cumberland Railway operated.

A. —

# (Reports of operation for 1918 were rendered to the Interstate Commerce Commission by the Federal Railroad Administration.)

[fol. 65] Mobile & Ohio Railroad:

Fulton County	6.635 miles	
Hickman County	17.052 "	
Carlisle County	10.576 "	
Ballard County	4.430 "	
Total		38.693 miles #

Southern Railway in Kentucky:

Main Line:		
Jefferson County	21.387 miles	
Shelby County	24.299 "	
Anderson County	17.555 "	
Mercer County	18.229 "	
Boyle County	2.000 "	
Total, Main Line		83.470 "
Lexington Branch:		
Anderson County	3.347 "	
Woodford County	12.047 "	
Fayette County	8.206 "	
Total, Lexington Branch		23.600 "
Georgetown Branch:		
Woodford County	9.138 miles	
Scott County	7.600 "	
Total, Georgetown Branch		16.738 "
Burgin Branch:		
Mercer County	3.820 miles	
Total, Burgin Branch		3.820 "
Grand Total		127.628 miles #

Does not include lines operated under trackage rights.

Cumberland Railway:

Bell County	1.74 miles

Cumberland Railway Co.:

Knox County	12.90 "

[fol. 66] Q. 6. Did any other company listed in answer to question two above operate within Kentucky? If so, which of them and give counties in which operations were carried on and the mileage therein.

A. No.

Q. 7. What was the total of the railway operating revenues for each of the roads listed in the answer to question two above?

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 8. What was the total railway operating expenses for each of said roads?

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 9. What were tht total railway tax accruals for each of said roads?

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 10. What was the total non-operating income for each of said roads?

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 11. What further amounts of money were deducted from each of said roads to determine the profit and loss for said year? Give general classification and amount.

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 12. Explain briefly the nature of each of these deductions, that is explain what the deductions represent or the nature of the expenses.

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 13. Name the officers and directors of the "Southern Railway Company in Kentucky" and state what relation, if any, each of them bore to the defendant company.

A. — Directors

1917	1918
W. S. Camp	W. S. Camp
Fairfax Harrison #	Fairfax Harrison #

# Also Directors Southern Railway Co.

1917	1918
C. E. A. McCarthy	E. A. Merrill
E. A. Merrill	C. E. A. McCarthy
H. B. Spencer*	H. B. Spencer
F. S. Wynn	F. S. Wynn

[fol. 67] Officers

1917	1918
President, Fairfax Harrison #	Fairfax Harrison #.
Vice-President, J. M. Culp	L. E. Jefferies #.
“ T. C. Powell #	H. B. Spencer #.
“ H. B. Spencer	H. W. Miller #.
“ H. W. Miller #	J. B. Munson #.
Secretary, F. S. Wynn #	F. S. Wynn #.
Treasurer, H. C. Ansley #	F. S. Wynn #.
General Counsel, F. L. Stetson #	F. L. Stetson #.
General Counsel, A. P. Humphrey #	—— ——.
Comptroller, A. H. Plant #	E. H. Kemper #.
General Manager, E. H. Coapman #	—— ——.

Q. 14. Name the officers and directors of the Mobile & Ohio Railroad and state what relation, if any, each of them bore to defendant company.

A. — Directors

1917	1918
Albert P. Bush	Albert P. Bush
Guy Cary	Guy Cary*
Johnston Deforest	Johnston Deforest
Henry Hall	Henry Hall
Fairfax Harrison*	Fairfax Harrison*
Adrian Iselin, Jr.*	Adrian Iselin
Ernest Iselin	Ernest Iselin
W. Emlen Roosevelt	H. W. Miller*
C. Sidney Shepard	W. Emlen Roosevelt
H. B. Spencer*	C. Sidney Shepard
H. M. Street	H. M. Street
R. V. Taylor	Samuel Woolverton
Samuel Woolverton	F. S. Wynn

#Held similar office with Southern Railway Co.

* Also Directors Southern Railway Co.

Officers

1917	1918
President, Fairfax Harrison #	Fairfax Harrison #.
V.-Pres. & Gen. Mgr., R. V. Taylor	V. P. L. E. Jefferies #.
Treasurer, H. C. Ansley #	V. P. H. W. Miller #.
Comptroller, C. B. Hayes	V. P. C. B. Hayes.
Gen. Counsel, S. R. Prince	—— ——.
Secy., F. S. Wynn #	Secy., F. S. Wynn #.
Asst. Secy. & Asst. Treas., Geo. A. Cooke	Compt. E. H. Kemper #.
Gen. Supt., E. C. Rendell	—— ——.
Frt. Trf. Mgr., Haiden Miller	—— ——.
Gen. Frt. Agt., J. M. Denyven	—— ——.
Gen. Pass. Agt., C. Rudolph	—— ——.

[fol. 68] Q. 15. Names the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant company.

Directors

1917	1918
A. J. Hazeltine	Fairfax Harrison*
L. R. Freeman	L. E. Jefferies
C. B. Ayres	C. E. A. McCarthy
G. H. Dunham	E. A. Merrill
R. W. Stone	J. B. Munson
J. L. Stone	H. B. Spencer
F. F. Whittekin	F. S. Wynn

Officers

1917	1918
President, R. W. Stone	President, Fairfax Harrison #.
V. P., C. B. Ayres	V. P., L. E. Jefferies #.
Secy., J. L. Stone	V. P., H. B. Spencer #.
Treas., A. J. Hazeltine	V. P., H. W. Miller #.
Auditor, A. C. Matheson	V. P., J. B. Munson #.
Gen. Mgr., T. H. Hayden	Secy., F. S. Wynn #.
Gen. F. A., A. C. Matheson.	Compt., E. H. Kemper #.
Gen. P. F., A. C. Matheson.	—— ——.
Chief Eng., T. H. Hayden.	—— ——.

# Held similar office with Southern Railway Co.

*Also Director Southern Railway Co.

Q. 16. Name the officers and directors of the Cumberland Railway and state what relation, if any, each of them bore to defendant company.

Directors

1917	1918
D. A. Carpenter	Fairfax Harrison*
W. P. Chamberlain	S. B. Luttrell
Fairfax Harrison*	L. D. Smith
S. B. Luttrell	H. B. Spencer
G. W. Montgomery	F. S. Wynn

Officers

1917	1918
President, Fairfax Harrison #	Fairfax Harrison #.
V. P., H. B. Spencer #	# L. E. Jefferies & H. B. Spencer #.
Secretary, F. S. Wynn #	F. S. Wynn #.
Treasurer, H. C. Ansley #	F. S. Wynn #.
Gen. Counsel, A. P. Humphrey #	—— ——.
Comptroller, A. H. Plant #	E. H. Kemper #.
General Manager, E. H. Coapman #	—— ——.

[fol. 69] Q. 17. Explain the relationship between the Southern Railway Company (Corporate) and the Southern Railroad (Federal) with regard to income, expenses, taxes, accounting and mileage operated.

A. Corporate Income Statement for 1918, Exhibit C, attached.

Exhibit B sets forth results of operation as reported for account of Federal Administration, and represents Federal's income for such operation; while Exhibit C reflects compensation to the Southern Railway Company made by the United States Government under the Act of March 21, 1918, and for such compensation indicated on Exhibit C as Standard Return, there is no deduction reflected in the operations under the Federal Administration as shown by Exhibit B.

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* Also Director Southern Ry. Co.

# Held similar office with Southern Railway Co.

Southern Railway was under federal operation during 1918, and therefore had no operated mileage.

EXHIBIT A FOR 1917

Mileage Statistics

Owned, Leased, Controlled, and Operated by Southern Railway Co., Year Ended June 30, 1917

Owned:		
Southern Railway Company		4,215.24
Leased:		
Southern Railway—Carolina Division	755.12	
Virginia & Southwestern Railway	188.96	
Elberton Southern Railway	50.60	
Mobile & Birmingham Railroad	150.35	
Richmond & Mecklenburg Railroad	31.30	
Georgia & Midland Railroad	97.88	
North Carolina Midland Railroad	53.52	
North Carolina Railroad	225.95	
Atlanta & Charlotte Air Line Railway	263.08	
Atlantic & Danville Railway	277.71	
North & South Carolina Railroad	3.73	
Lockhart Railroad	13.81	
Wooldridge-Jellico Coal Co.	1.75	
Memphis-Chattanooga Railway	2.83	
		2,116.59
Operated under Agreement:		
Southern Railway Company in Mississippi		11.40
Trackage Rights		517.50
[fol. 70] Controlled by Ownership of Stock:		
State University Railroad	10.20	
Sievern & Knoxville Railroad	17.44	
Ensley Southern Railway	33.42	
Roswell Railroad	12.55	
Cumberland Railway	11.21	
Tennessee & Carolina Southern Ry.	29.89	
Southern Railway in Kentucky	127.64	

The Alabama Great Southern Rd.	312.27	
Atlantic & Yadkin Railway Co.	163.10	
Asheville & Craggy Mountain Ry.	4.44	
Blue Ridge Railway Co.	44.00	
Cumberland Railroad Co.	12.90	
Carolina & Tennessee Southern Ry. Co.	13.90	
Danville & Western Ry. Co.	80.78	
Georgia Southern & Florida Ry. Co.	402.05	
Hartwell Railway Co.	10.10	
High Point, Randleman, Ashboro & Southern	27.98	
Mobile & Ohio Rd. Co.	1,160.30	
New Orleans & Northeastern R. R. Co.	203.73	
Northern Alabama Railway Co.	112.50	
Tallulah Falls Railway Co.	58.00	
Yadkin Railroad	52.23	
		2,900.63
		9,761.36

Exhibit B for 1917 is in words and figures as follows, to-wit **(two sheets)**:

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

STIPULATION RE EXHIBITS—Filed Aug. 10, 1921

It is agreed by counsel for the parties in the above-named causes that the following original exhibits shall not be copied by the Clerk, but that said exhibits shall be taken from the record in the Woodford Circuit Court and attached to the copy of the record for the Court of Appeals, and when so attached they shall have the same effect as if the Clerk had made copies thereof in the record. The exhibits referred to are the exhibits headed "Income Account year 1914, Income Account year 1915, and Income Account year 1916," all marked Exhibit B., and which are filed with the answer of the defendant in the first named cause; also Income Account June 30, 1917, and Federal Income Account, December 31, 1918, both marked Exhibit B., filed with the answer of the defendant in the last-named cause.

[fol. 71] The Clerk will copy this stipulation with the record of the Court of Appeals.

Leslie W. Morris, Hobson & Hobson, for Plaintiff.
Wallace & Harriss, Humphrey, Crawford & Middleton, for Defendant.

[File endorsement omitted.]

Exhibit C is in words and figures as follows, to-wit:

Southern Railway Company

Corporate Income Statement for Year Ended December 31, 1918

Exhibit C

Corporate Income:	
Certified Standard Return under Federal Control Act	$18,653,893.15
Operating Income—Revised Income from Lease of Road	60,176.84
Miscellaneous Rent Income	243,333.27
Net Income from Rail Leased	41,163.18
Dividend Income	1,020,562.30
Income from Funded Securities	682,623.15
Income from Unfunded Securities and Accounts	129,317.94
Miscellaneous Income	1,556.74
Total Corporate Income	$20,832,626.57
Deductions:	
Rent for Leased Roads	$2,338,822.14
Miscellaneous Rents	31,007.35
Separately Operated Properties	5,591.90
Interest on Unfunded Debt	42,295.81
Corporate Expenses	187,519.38
War Taxes	574,006.75
Miscellaneous Income Charges	89,328.49
Total Deducation of this class	$3,268,571.82
Total Available Income	$17,564,054.75

Interest Accrued on Funded Debt	$10,947,490.00
Interest Accrued on Equipment Obligations	681,643.89
Dividend Accrued on Southern Railway—Mobile & Ohio Stock Certificates	226,008.00
Total Deductions of this Class	$11,855,141.89
[fol. 72] Balance of Income Over Charges	$5,807,912.86
Dividend of 5% on Preferred Stock	3,000,000.00
Appropriations of Income for Additions & Betterments	58,728.21
Balance Carried to Credit of Profit & Loss	$2,650,184.65

In answer to the 17th Interrogatory the following are the facts:

Prior to and since January 1, 1917, a corporation called the Southwestern Construction Company owned a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. The Southern Railway Company owned a certain number of shares of the stock of the Southwestern Construction Company, and the Alabama Great Southern Railroad Company owned a certain number of the shares of the stock of the said Southwestern Construction Company. The Southern Railway Company owned a majority of the stock in the Alabama Great Southern Railroad Company. The ownership of the Southern Railway Company and of the Alabama Great Southern Railroad Company in the stock of the Southwestern Construction Company was less than half of said stock. Since January 1, 1917, the amount of stock in the Southwestern Construction Company owned by the Southern Railway Company and the Alabama Great Southern Railroad Company has been more than half of said stock.

The item "hire of Equipment" is the balance due by the said Southern Railway Company to other railroads on account of the use of the equipment of such other railroads, less any balance due to the Southern Railway Company for the use of its equipment by other railroads.

"Joint Facility Rents" are the amounts due by the Southern Railway Company to other railroads or terminal companies on account of the use of such property as terminal facilities, owned by such other railroads or terminal companies, less any amounts due to the Southern Railway Company for the use of its terminal facilities or other similar property, by other railroads or terminal companies.

In ascertaining the net income of railroads, which income is capitalized in order to ascertain the value of the capital stock of said railroads, it is and has been, during the years in controversy herein, the fixed rule of the assessing authorities of Kentucky to deduct taxes, hire of equipment in debit and joint facility rents in debit.

Sworn to by Alex P. Humphrey; jurat omitted in printing.

[fol. 73] [File endorsement omitted]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

REPLY—Filed June 28, 1920

Comes the plaintiff, Commonwealth of Kentucky, by Robert Hawkins, Sheriff of Woodford County, and for its reply to paragraphs one and two of the answer of defendant says that this action did not, does not, and will not hereafter affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds. Plaintiff says that no act or authority of the defendant, Director General, or his operation of the railroads of the United States may amend or repeal or impair or affect the right of plaintiff to collect or to proceed to collect the taxes alleged to be due in its original statement herein; according to the Act of Congress in such cases made and provided.

Plaintiff further says that the net earnings or income of the defendant, according to Kentucky Statutes so made and provided, must include and do necessarily include the net earnings or income of each of the railroads controlled by it. The miles of line produce said income and that when said miles of line form a part of defendant's total system, then the net earnings or income of each of said component parts must be added together to determine the net earnings or income of defendant. Plaintiff therefore denies that the net earnings or income of defendant for the year ending June 30, 1917, was $25,043,853.67 and avers same was $45,312,000.00 as alleged in its statement herein; plaintiff further denies that the net earnings or income of defendant for the year ending December 31, 1918 was $30,438,341.39 and avers same was $43,865,000.00 as alleged in its statement herein:

For reply to paragraph 3 of defendant's answer plaintiff says that said State Tax Commission may have deducted taxes in fixing the net earnings or income of railroads for each of said two years. Plaintiff says that the action of said Commission in deducting taxes to determine net earnings or income was based on an error of law, in that no natural person is or ever was allowed any deduction for taxes paid, in computing the value of intangible property; and it is further provided by the Constitution of this Commonwealth that all corporate property, shall pay the same rate of taxation paid by individual property. The deduction of taxes paid, by said Commission results in corporate property paying taxes at a less rate than paid by individual property.

Plaintiff further says that the action of said commission in capitalizing net earnings or income at 7% was based on an error of law and says that 6% is the true lawful rate for said capitalization.

Plaintiff denies that for each of any of the taxing years mentioned in the statement, local or any assessors or assessor, or other or any assessing officers of the State of [fol. 74] Kentucky have either habitually, or intentionally or systematically or generally assessed the property of individuals or individual or corporations or corporation within their sphere of duty at 60 per cent or any other per cent less than 70 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale. Denies that said alleged assessment has been a matter of public or any notoriety in the State. Plaintiff admits that said Commission equalized at seventy per cent to conform with the ruling of the Supreme Court of the United States. Plaintiff denies that it would be a violation of the Constitution of Kentucky or of the United States to make an assessment on a basis of seventy per cent.

And for further reply to paragraph four of defendant's answer, plaintiff denies that in none of said periods did defendant have any tangible property in this State, denies that defendant has no intangible property in this State, during said periods. Plaintiff denies that the four or any lines of railroads within Kentucky as set out in its statement herein have been assessed against defendant. An assessment has been made of said four lines, but made no reports which did not show the defendant's property in Kentucky. Plaintiff admits that defendant had double track and certain terminals outside of Kentucky and avers that on account thereof defendant may be entitled to a further equalization not exceeding five per cent, making an admitted equalization of 70% less 5% or 65%.

Plaintiff denies that this action is an effort to bring into Kentucky or earnings derived from porperty not in Kentucky, or value or values appertaining to property not in Kentucky or earnings derived from p-operty not in Kentucky; denies this action is in violation of the Constitution of Kentucky or of the United States; denies that a judgment for plaintiff herein is in violation of the Constitution of Kentucky or the United States.

Wherefore plaintiff prays as in its statement.

Hazelrigg & Hazelrigg, Leslie W. Morris, W. D. Jesse,
Hobson & Hobson, Attys. for Plaintiff.

[File endorsement omitted.]

[fol. 75] IN COUNTY COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendant,

and

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, etc., Defendants

JUDGMENT—Sept. 23, 1920

Came the parties and filed stipulations and by consent these two cases are heard together and the case being submitted to the Court and the Court being advised it is adjudged by the Court that the plaintiff's petitions be dismissed and that plaintiff take nothing thereby to all of which plaintiff excepts and prays an Appeal which is granted.

Said Judgment is endorsed as follows, to-wit: Entered in Order Book No. 4, at page 594.

Thereafter and on the 29th day of September, 1920, the following Copy of the Judgement of the Woodford County Court was filed in the Woodford Circuit Court:

[Omitted; printed on page 25 ante.]

IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendant,

and

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, etc., Defendants

JUDGMENT AND APPEAL ORDER—March 12, 1921

This day came the parties to the above proceedings, and filed stipulations in each case, and by consent these two cases are heard together; and said cases being submitted [fol. 76] to the Court on the pleadings, exhibits and stipulations now filed, and the Court being advised, it is adjudged by the Court that the plaintiff's petitions be dismissed in each of said cases, and that plaintiff take nothing in either, to all of which, and as applying to each case, the plaintiff objects and excepts and prays an Appeal to the Court of Appeals, which is granted.

The printed reports to the stockholders and the reports to the Auditor, filed in the record, are not to be copied in the transcript, but will be filed with the Transcript with the Clerk of the Court of Appeals; and the stipulations used in the County Court and not in the Circuit Court are not to be copied in the Transcript.

The defendants, in each of said cases shall recover of R. S. Hawkins, as Sheriff of Woodford County, their costs in said causes expended.

Approved: J. P. Hobson, for Plff.; Chas. M. Harris, for Deft.

IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS, Sheriff of Woodford County, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY and WALKER D. HINES, Director General of Railroads, Defendants

STIPULATION OF FACTS—Filed March 12, 1921

The parties hereto by their respective counsel, hereby stipulate the following facts as applicable to this case for the purposes of a trial in the Circuit Court.

1. The Southern Railway Company of Virginia owns to the extent and as set out in the answer to the petition and the answers to the interrogatories herein the stock of the following four railroads, which do own property and operate in Kentucky, viz: Southern Railway Company in Kentucky, Cumberland Railroad Company, Cumberland Railway Company, Mobile & Ohio Railroad Company.

2. When the Southern Railway Company in Kentucky acquired the property of the Louisville Southern Railway Company in 1894, it also acquired the following equipment, viz:

[fol. 77] Steam locomotives	25
Box Cars	609
Flat cars	47
Stock Cars	70
Caboose cars	12
All classes of freight cars	738
Coaches	15
Combination Passenger Cars	3
Baggage & Express Cars	5
All classes of Passenger Cars	23

Derrick Cars	1
Other Company Service Cars	7
All classes of company service cars	8
All classes of cars in service	769

Since that time the above named equipment has been used by the Southern Railway Company in Kentucky in common exchange with the defendant, Southern Railway Company of Virginia, that is, portions of the equipment above named have been used by the Southern Railway Company in Kentucky, and portions by the Southern Railway Company of Virginia outside of Kentucky, but where any of this equipment was used by the Southern Railway Company of Virginia, such use by the Southern Railway Company of Virginia was without charge to that Company, in consideration of that Company's furnishing to the Southern Railway Company in Kentucky a like number of engines or cars without charge to the Southern Railway Company in Kentucky.

When any of the above equipment has become out of repair or unfit for service, it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway Company in Kentucky; so that, for every period of time from 1894 up to and including the present time, the Southern Railway Company in Kentucky owns the same number of locomotives, freight and passenger cars, etc., that it did in 1894, and has reported each year and tax-paid each year on the same description and value of equipment as on hand September 17, 1894.

The Southern Railway Company in Kentucky has bought no equipment since 1894.

3. Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in Stipulation 2, it has leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of various other railroad companies, and has done this under the usual traffic arrangement obtaining among railroads, and for such use of equipment has paid to the defendant, Southern Railway Company of Virginia, and other Railroads, the regular charges for such hire of equipment.

4. No railroad operates entirely with its own rolling stock; that all such rolling stock equipment is in more or

less common use among the different railroads, and for such use each railroad pays to the owning railroad the regular standard prices.

[fol. 78] 5. Except for the ownership of stock of the four railroads specified in Stipulation 1, and except for the equipment detailed in Stipulation 3, the Southern Railway Company of Virginia owns otherwise no property or lease of any kind in the State of Kentucky, and transacts no business in the State of Kentucky, except the solicitation and routing to their destination of freight and passengers, unless, under the evidence and stipulations, its owns or operates said lines of railroad or any of them within the meaning of the Kentucky Statutes, and this question is submitted to the Court on all the facts.

6. The printed pamphlets filed June 28, 1920, marked "Annual Reports of the Southern Railway Company" for the years in question, are the reports to the stockholders made and printed by the corporation and are correct copies of said reports. The plaintiff read on the trial from said report for 1914, pages 17, 69, 67; for 1915, pages 15, 68, 69; for 1916, pages 55, 56; for 1917, pages 51, 53; for 1918, pages 19, 21, and no other pages were read on the trial.

7. The Southern Railway Company in Kentucky was incorporated under the laws of the State of Kentucky on August 17, 1894. A copy of the articles of incorporation, hereto attached, is a true and correct copy of such articles of incorporation.

The line of railroad owned and operated by the Southern Railway Company in Kentucky extends from Louisville, Kentucky, in an easterly direction to Danville, Kentucky passing through Shelbyville, Lawrenceburg and Harrodsburg, Kentucky. There are branch lines extending from Harrodsburg to Burgin, Kentucky, from Lawrenceburg to Lexington, Kentucky, and from Versailles to Georgetown, Kentucky.

At Danville, Burgin, Lexington, and Georgetown, the lines of the Southern Railway Company in Kentucky connect with the line of the Cincinnati, New Orleans & Texas Pacific Railway Company's road from Cincinnati, Ohio, to Chattanooga, Tennessee. At each of such points all of the terminal facilities used by the Southern Railway Company in Kentucky are the property of the Cincinnati, New Orleans & Texas Pacific Railway Company. At Louisville, Kentucky, the passenger depot belonging to the Illinois Central Railroad Company is used.

At Louisville, Kentucky, the Southern Railway Company in Kentucky uses the passenger depot belonging to the Illinois Central Railroad Company, and the shops, roundhouses and freight yards belonging to the Kentucky & Indiana Terminal Railroad Company. The only terminal facility owned in Louisville by the Southern Railway Company in Kentucky is its freight house.

The Southern Railway Company in Kentucky owns no double track lines and the only terminal facilities owned by it are inexpensive ones situated in the small towns along the route.

What is now the Southern Railway Company in Kentucky was originally chartered by the State of Kentucky in 1868 under the name of the "Louisville, Harrodsburg and [fol. 79] Virginian Railroad Company" (Acts 1867-1868, Vol. 2; p. 553). *O*n 1884, the charter was amended and the name changed to that of "Louisville Southern Railroad Company" (Acts 1883-1884, Vol. 2, page 665). The City of Louisville subscribed $100,000 of bonds to aid in the construction of the road (Wooley v. Louisville Southern, 93 Ky. 223, 19 S. W. 595).

In 1888, a line had been built from Louisville, Kentucky to Burgin, Kentucky.

On December 10, 1888, the Louisville Southern Railroad Company leased all of its property to the Monon Railroad. After this lease, a branch line was constructed from Lawrenceburg, Kentucky, to Lexington, Kentucky.

In 1884, there was chartered by the legislature the "Versailles & Midway Railway Company" (Acts 1883-1884, Vol. 2, p. 9), and in 1885, the line from Versailles, Kentucky, to Midway, Kentucky, was constructed by that Company.

In 1889, the Louisville Southern Railroad Company acquired the stock of the Versailles & Midway Railway Company and the line from Midway, Kentucky, to Georgetown, Kentucky, was completed, and the three roads were consolidated.

In 1890, the Louisville Southern Railroad Company leased all of its property to the East Tennessee, Virginia

& Georgia Railway Company, and on July 1, 1893, default having been made in the payment of interest on bonds, the property of the Louisville Southern Railroad Company was foreclosed in the Circuit Court of the United States for the District of Kentucky and the property sold on August 16, 1894, to Charles H. Coster. Thereafter, on August 17, 1894, there was incorporated the Southern Railway Company in Kentucky to take over the lines, franchises, etc., of the Louisville Southern Railroad Company, and that corporation has since continued to own and operate what was formerly the Louisville Southern Railroad Company.

The Southern Railway Company of Virginia was incorporated February 20, 1894. Neither it nor its predecessors had any stock in or control of any of the predecessors of the Southern Railway Company in Kentucky.

8. The Cumberland Railroad Company was incorporated under the laws of the State of Kentucky on —— —, ——. It owns and operates a line of railroad beginning at Artemus, Kentucky, on the line of the Louisville & Nashville Railroad Company and running in a southeasterly direction 12.9 miles, all in Knox County, Kentucky. It connects with no other railroad except the Louisville & Nashville Railroad Company at Artemus, Kentucky.

9. The Cumberland Railway Company was incorporated under the laws of the State of Tennessee, and owns and operates a line of railroad 1.74 miles long in Bell County, Kentucky, and extending from a point in Bell County, Kentucky, to the tracks of the line of railroad owned and operated jointly by the Louisville & Nashville Railroad Company and the Southern Railway Company outside of the State of Kentucky.

[fol. 80] 10. The Mobile & Ohio Railroad Company was chartered by the States of Alabama, Mississippi and Tennessee in 1848 (Acts of Alabama, 1848, p. 225; Laws of Mississippi, 1848, p. 83; Acts of Tennessee, 1847-1848, p. 177) and in 1848, the State of Kentucky passed an act "to authorize the Mobile & Ohio Railroad Company to extend their railroad from the southern boundary line of the State of Kentucky to the Mississippi or Ohio Rivers" (Acts of Kentucky, 1847-1848, p. 344). The States of Alabama and Mississippi (1850 and 1852) gave to the Mobile & Ohio Railroad Company a total of the 1,156,658.92 acres of land for the purpose of assisting in the financing of that road. On June 30, 1901, the Mobile & Ohio Railroad Company still held 303,102.22 acres of this land. The construction of this road was commenced in March 1952, and completed in December, 1857.

In January, 1901, the Southern Railway Company of Virginia offered to exchange its own securities for enough of the stock and securities of the Mobile & Ohio Railroad Company to give it a majority holding in that Company. By April, 1901, a majority of the stock and securities of the Mobile & Ohio Railroad Company was thus secured and has been held since by the Southern Railway Company of Virginia.

The road of the Mobile & Ohio Railroad Company extends from St. Louis, Missouri, to Mobile, Alabama. It only passes through one corner of the State of Kentucky, and touches no large cities in the State of Kentucky. Its total mileage in the State of Kentucky during the years involved was only 38.693 miles.

11. There are no double-tracks or extensive or expensive terminals or shops in Kentucky belonging to either the Southern Railway Company in Kentucky, the Cumberland Railroad Company, the Cumberland Railway Company or the Mobile & Ohio Railroad Company.

12. The Southern Railway Company of Virginia owned terminals, shops and double tracks outside of the State of Kentucky of the value of:

1917:	
Double track	$53,918,513.72
Terminals	64,396,142.17
Total	$118,314,655.89
1918:	
Double track	$58,800,035.50
Terminals	70,593,076.10
Total	$129,393,111.60

[fol. 81] 13. The Alabama Great Southern Railway Company owned during the years in controversy terminals of the value of $45,478.12, double track,

1917	$2,098,284.71
1918	2,603,134.71

14. The net income of the Southern Railway Company of Virginia, including that of the railroads owned, operated, leased or controlled by it for the years in controversy was:

1917	$31,806,408.49
1918	32,969,380.58

The above figures do not include sums paid for taxes which were as follows:

1917	$4,668,758.78
1918	5,132,427.18

If the Court is of opinion that taxes are not deductible in ascertaining net income, the above sums are to be added.

15. The four railroads operating in Kentucky had a combined mileage during the years in controversy as follows:

1917, 1918:

Southern Railway Company in Kentucky	127.628
Mobile & Ohio Railroad Company	38.693
Cumberland Railroad Company	12.90
Cumberland Railway Company	1.74
	180.961
Trackage rights over other r. r.	38.919
Total mileage	219.88

16. The Southern Railway Company of Virginia, during the years involved, owned, operated, leased and controlled the following mileage:

1917	9,761.36 miles
1918	9,601.83 miles

17. During each of the years involved, the Southern Railway Company in Kentucky, Cumberland Railroad Company, Cumberland Railway Company and the Mobile & Ohio Railroad Company, by their respective officers, or

during Federal Control by the officers of the Director General, filed with the State Railroad Commission, State Board of Valuation and Assessment, and the Tax Commission of Kentucky full reports showing the result of all of the operations, etc., of the respective road as required by statute, and each company paid the full tax assessed on its tangible and intangible property.

[fol. 82] 18. For the years 1914, 1915 and 1916, the property of all railroads in the State of Kentucky was equalized at sixty per cent of its value.

19. For the years 1917 and 1918, the property of all railroads in the State of Kentucky was equalized at seventy per cents of its value.

20. In its report to the Kentucky Railroad Commission for each of the years in question the following question and answer thereto appears in the reports made by the Southern Railway Company in Kentucky:

"2. Did any corporation or corporations, transportation or other, hold control over the respondent at the close of the year?

"*And.* This company is advised that the Southern Railway Company controls this company through the ownership of its entire Capital Stock."

Substantially the same answers were made by the Cumberland Railroad Company and Cumberland Railway Company.

The Mobile & Ohio Railroad Company reported substantially the same, except that the control was affected by the ownership of a large majority of its capital stock.

21. The incorporators of the Southern Railway Company in Kentucky were: Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. Ewen, William H. Baldwin, Jr. Samuel Spencer was the President of the defendant, Southern Railway Company. The money paid for the property was furnished by the defendant and it caused the organization of the corporation.

22. At all of the stations of the Southern Railway Company in Kentucky the bulletin boards have at the head of

them in large capital letters these words: "Southern Railway System." The same sign is on the window of the office building in Louisville and over the door are these words: "Southern Railway Company in Kentucky, Incorporated."

The Treasurer's Office of the Southern Railway Company in Kentucky is kept in Washington in the same building and by the same men as the Southern Railway Company in Virginia.

23. For each of the years involved, the amount paid by all of the railroads in the State of Kentucky for taxes was deducted by the Board of Valuation and Assessment or Tax Commission from the Income of such railroads before the said income was capitalized for the purpose of arriving at the franchise tax.

Hazelrigg & Hazelrigg, Leslie W. Morris, Hobson & Hobson, W. D. Jesse, Attorneys for Plaintiff.
Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendants.

[fol. 83] Southern Railway Company in Kentucky

Articles of Incorporation, August 17th, 1894

We, the undersigned, to-wit: Charles H. Coster, a purchasing committee, hereinafter called the Purchaser, Who did purchase the railroad and other property of the Louisville Southern Railroad Company at a sale thereof held in the City of Louisville, Kentucky, on the 16th day of August, 1894, under a decree of foreclosure and sale entered on the 11th day of June, 1894, and amended June 21, 1894, in a certain suit in Equity pending in the Circuit Court of the United States of America for the District of Kentucky, wherein the Central Trust Company of New York and others were complainants and the Louisville Southern Railroad Company, a corporation created by and existing under the laws of the State of Kentucky, was defendant, in which suit it was sought to foreclose the mortgage dated the 1st day of July, in the year 1890, and upon or about that day duly executed, acknowledged and delivered by the said Louisville Southern Railroad Company to said Central Trust Company of New York, and in which suit it was undertaken to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said Louisville Southern Railroad Company, and the said purchasing Committee having at the time of said purchase declared, and the said Court having subsequently ordered and decreed, that the said sale should be for the benefit of a corporation thereafter to be formed under the laws of Kentucky by the name of the "Southern Railway Company in Kentucky," and the said purchasing Committee having paid for the said railroad property sold under the said judgment decree the sum of one million dollars ($1,000,000), of which twenty thousand dollars ($20,000) was paid in cash to the Special Master making the sale, and the remainder thereof, to-wit, nine hundred and eighty thousand dollars ($980,000) has been paid by delivering to the Special Master, for proper endorsement thereon of partial payment bonds of the Louisville Southern Railroad Company, secured by said mortgage to the amount of four million two hundred ninety-nine thousand five hundred dollars ($4,299,500), and the said Court having ordered and decreed the Special Master, Edmund T. Halsey, as further evidence of such sale and purchase, to execute and deliver a deed and conveyance to the said Southern Railway Company in Kentucky, accepted as purchaser in said proceedings, of all of the railroad property described in said judgment decree, to-wit:

All and singular the rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property, of every description, whether real, personal or mixed, embraced or included in the said decree of sale and the sale pursuant thereto, that is to say:

All and singular the railroad of the said Louisville Southern Railroad Company, beginning at a point on Magnolia Avenue, between Eleventh and Twelfth streets, in the city of Louisville, and extending thence through the Counties of Jefferson, Shelby, Anderson and Mercer, via Shelbyville, Lawrenceburg and Harrodsburg, to Burgin, in Mercer [fol. 84] County, on the Cincinnati Southern Railroad, and extending from Lawrenceburg through Versailles in Woodford County to Lexington in Fayette County, and also to Georgetown in Scott County, including all rights of way, roadbed, rails, bridges, railroad tracks, switches, side tracks, turntables, lands, depots, station houses, round houses, machine shops, buildings and structures of every sort, with all other things which are part of, connected with or appurtenant to said railroad as above described in all locomotives engines, tenders, cars, carriages, tools, machinery, rolling stock and equipment; also the full benefit of certain contracts between the Louisville Southern Railroad Company and the Kentucky and Indiana Bridge Company, and the Newport News and Mississippi Valley Railroad Company mentioned in said decree, together with all rights and privileges existing thereunder for and during the full term thereof; also certain depot grounds and buildings at Thirteenth and High Streets, and the eight acre tract adjoining the Kentucky and Indiana Bridge Company's yards described in said decree; also, all property franchises, rights, powers, privileges and immunities belonging or appurtenant to said Louisville Southern Railroad Company, and all tools, incomes, issues and profits arising out of or to be derived from the above-described mortgaged premises, and all the right, title, interest and estate, either legal or equitable, of the Louisville Southern Railroad Company in and to said mortgaged premises excepting, however, any extension of said railroad beyond either of the terminal points herein mentioned, to-wit, Louisville, Burgin, Lexington and Georgetown, and any branch or branches constructed from said railroad, as the same existed at the date of the mortgage mentioned in said decree, to-wit, July 1, 1890, and all rolling stock and equipment expressly purchased by reason and for the use of such extention of such branch or branches.

A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 11th of June, 1894, to which reference is hereby made.

Together with all the corporate rights, privileges, immunities and franchises of said Louisville Southern Railroad Company, and all the tolls, fares, freights, rents, incomes, issues and profits of said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold at any time owned or acquired by and now in the possession of, said Louisville Southern Railroad Company, or Samuel Spencer and Henry Fink, or either of them, and Receivers thereof.

And we, whose names are also hereto subscribed, to-wit: Samuel Spencer, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt, and William H. Baldwin, Jr., hereinafter called Associates, whom such Purchaser has associated with him in this organization of a new corporation pursuant to the laws of Kentucky.

Do hereby join in executing these Articles of Incorporation, and do hereby certify, specify, and declare that we have associated to form a corporation for the purpose of pur- [fol. 85] chasing, owning, constructing, operating and maintaining the railroad hereinbefore described; and we do further certify:

First. The name of the Corporation shall be Southern Railway Company in Kentucky.

Second. The name of the City and County in which its principal office or place of business is to be located is the City of Louisville, in the County of Jefferson.

Third. The nature of the business or objects or purposes proposed to be transacted, promoted or carried on is that of owning, operating and maintaining the railroad above described, with such extensions and branches thereof as may from time to time be constructed or acquired in accordance with law.

Fourth. The amount of its capital stock is one million dollars (1,000,000) and the number of shares into which the same shall be divided is ten thousand shares of the par value of one hundred dollars ($100) each. All such capital stock having been issued to such purchaser and associates as fully-paid stock in part consideration of the transfer to the corporation hereby formed of the property so sold as aforesaid.

Fifth. The name and place of residence of each of its stockholders is as follows: Samuel Spencer, New York, N. Y.; Charles H. Coster, New York, N. Y.; Alexander B. Andrews, Raleigh, N. C.; Francis Lynde Stetson, New York, N. Y.; William A. C. Ewen, Dobbs Ferry, N. Y.; Thomas W. Bullitt, Louisville, Ky.; William H. Baldwin, Jr., Washington, D. C.

Sixth. The time when said corporation is to commence is the date of the filing of these articles, and it is to continue in perpetuity.

Seventh. The affairs of the corporation are to be conducted by five directors, who shall hold office until the first meeting of the stockholders of the company to be held; and the names of the first Board of Directors shall be: Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, William H. Baldwin, Jr. The first annual election of directors shall be held at Louisville on the First Monday of August, 1895.

Eighth. The highest amount of indebtedness or liability which the corporation may at any time incur is ten million dollars ($10,000,000).

Ninth. The private property of the stockholders is not subject, under any circumstances, to the payment of the debts of the corporation.

Tenth. The place from and to which, and the name of each county into or through which the said railroad is now constructed and is intended to be operated, are hereinbefore truly set forth. Its length, as near as may be, is one hundred and thirty and five-tenths (130.5) miles.

[fol. 86] In witness whereof, we have executed, signed and acknowledged these articles this seventeenth day of August, 1894.

—— ——, Purchaser. —— ——, Associates.

Witness: ——.

State of ——,
County of ——, ss:

I, —— ——, do hereby certify that the foregoing instrument in writing, or Articles of Incorporation, were this day produced to me by the parties and were severally acknowledged by the said Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt, and William H. Baldwin, Jr., to be their act and deed.

My commission expires —— —, ——.

Given under my hand and seal of office, this the — August, 1894. —— ——.

[File endorsement omitted.]

Thereafter and on the 12th day of March, 1921, the following judgment was entered of record, to-wit:

[Omitted; printed side page 75 ante.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

The Clerk is directed to copy on this appeal to the Court of Appeals the following parts of the record in each case: The statement and interrogatories, the amended statements, the answer and answers to interrogatories, the reply, the judgment and orders of the County Court, the judgment of the Circuit Court and the stipulations filed in the Circuit Court.

L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for Appellants.

[File endorsement omitted.]

[fol. 87] IN CIRCUIT COURT OF WOODFORD COUNTY

CLERK'S CERTIFICATE

I, C. A. Witt, Clerk of the Woodford Circuit Court do hereby certify that the first ninety-six foregoing typewritten pages are true, accurate and complete copy of the state- and interrogatories, answer and answers to interrogatories, reply, judgment and orders of the County Court, the judgment of the Circuit Court and the stipulations filed in the Circuit Court; that the exhibits marked "B" for 1914, "B" for 1915 and "B" for 1916, filed with and made a part of the defendant's answer are the original exhibits filed in the answer of the defendant in the case of the Commonwealth of Kentucky on relation &c. vs. Southern Railway Company, and which original exhibits are filed in this Transcript under stipulation found on page 57-a of the Transcript of Record: that the next eighty-eight typewritten pages is a true, accurate and complete copy of the statement and interrogatories, the amended statements, the answer and answers to interrogatories, the reply, the judgment and orders of County Court, the judgment of the Circuit Court and the stipulations filed in the Circuit Court; that the exhibits "B" Income Account June 30, 1917, and Federal Income Account December 31, 1918, filed with and made a part of defendants' answer, are the original Exhibits filed in the answer of the defendants in the case of Commonwealth of Kentucky on Relation &c. vs. Southern Railway Company and Walker D. Hines, Director General and which original exhibits are filed with this Transcript of Record under stipulation found on page 49-a of Transcript of record.

I further certify that the Printed Reports to the Stockholders and the Reports to the Auditor, hereto attached, are the original Reports filed in the record and which original Reports were ordered by the Judgment in the Circuit Court to be filed in the Court of Appeals.

I further certify that the foregoing transcript is a true and complete copy of the record in said cases ordered to be copied by said schedule and said stipulation.

Given under my hand as clerk of the Woodford Circuit Court, this the 12th day of August, 1921.

C. A. Witt, Clerk, Woodford Circuit Court.

[fol. 88]

In Circuit Court of Woodford County

Exhibit in Evidence

Page 17 of the Twentieth Annual Report of the Southern Railway Company, Year Ended June 30th, 1914

Report of the Vice-President and General Manager

Mr. Fairfax Harrison, President, Washington, D. C.

Washington, D. C., Sept. 8th, 1914.

Dear Sir:

I submit herewith a report of the operations of Southern Railway Company for the year ended June 30, 1914:

Miles of Road Operated June 30th, 1914

Location of lines	Owned	Leased or otherwise controlled	Operated under trackage rights	Total miles operated
District of Columbia	......	......	3.40	3.40
Virginia	550.87	276.84	40.15	867.86
North Carolina	591.50	754.97	120.68	1467.15
South Carolina	356.86	765.17	5.75	1127.78
Georgia	653.02	256.89	144.71	1054.62
Florida	......	5.99	35.82	41.81
Alabama	823.61	183.77	31.44	1038.82

Mississippi	71.92	11.40	19.58	102.90
Tennessee	663.14	36.17	31.33	730.64
Kentucky	127.75	2.09	42.73	172.57
Indiana	236.17	......	3.33	239.50
Illinois	157.11	......	5.78	162.89
Miles Operated June 30th, 1914	4231.95	2293.29	484.79	7009.94
Miles Operated June 30th, 1913	4239.05	2323.19	474.29	7036.53
Increase	......	......	10.41	......
Decrease	7.10	29.90	......	26.59

[fol. 89] In addition to the mileage operated by it, the Company owns the following lines which are leased to and operated by other companies:

	Miles
Orange, Va., to Gordonsville, Va. Chesapeake & Ohio Ry. Co.	9.40
Alexandria, Va. to Bluemont, Va. Washington & Old Dominion Railway	54.55
Anderson, S. C. to Belton, S. C.—Blue Ridge Railway Co.	9.98
Bulls Gap, Tenn., to Rogersville, Tenn. Virginia & Southwestern Railway Company	14.10
Gretna, Va., to Pittsville, Va.—Franklin & Pittsylvania Railroad Co.	7.10
Total mileage Leased to and operated by other companies	95.13

The Decrease in Miles Operated was occasioned by:

	Miles
Surrender of the line Pittsville, Va. to Rocky Mount, Va. on May 1st, 1914, to its owner, Franklin & Pittsylvania Railroad Company	29.90
Lease as of May 1st, 1914, of this Company's line from Gretna, Va., to Pittsville, Va. to Franklin & Pittsylvania Railroad Company	7.10
	37.00

Trackage Rights Acquired:

From the Louisville & Nashville Railroad Company, over the Stony Fork and Hignite Branch, in Kentucky	10.41
Net Decrease in Miles Operated	26.59

The average mileage of lines operated during the year ended June 30th, 1914, was 7,032.97, as compared with 7,035.61 for the preceding year, a decrease of 2.64 miles, or 0.04 per cent.

The average mileage of lines maintained during the year was 6,556.08, as compared with 6,561.26 miles during the preceding year, a decrease of 5.18 miles, or 0.08 per cent.

On June 30th, 1914, the mileage of double-track on lines owned, leased or otherwise controlled and operated by the Company including third and fourth tracks, was 402.64 miles, as compared with 358.39 miles on June 30th, 1913, an increase of 17.25 miles.

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Miles of Road Operated June 30th, 1914

Lines Owned

Seminary Junction Va. to Greenboro, N. C	278 58
Neapolis, Va. to West Point, Va	179.00
[fol. 90] Charlotte, N. C. to Augusta, Ga	190 49
Columbia, S. C. to Greenville, S. C	143 52
Salisbury, N. C. to Morristown, Tenn.	231 37
Bristol, Tenn. to Chattanooga, Tenn	241 55
Stevenson, Ala. to Memphis, Tenn	271 75
Tuscumbia, Ala. to Sweetwater, Ala	8 30
Ooltewah Junction, Tenn. to Brunswick, Ga.	410 09
Moscow, Tenn. to Somerville, Tenn	13 10
Austell, Ga. to Mississippi State Line	260 70
Okolona, Miss. to Calhoun City, Miss	37 82
Atlanta Junction, Ga. to York, Ala	270 50
Manassas, Va. to Harrisonburg, Va	112 89
Calverton, Va. to Warrenton, Va	8 90
Leftwich Junction, Va. to Durmid Junction, Va.	5 44
South Richmond, Va. to Rockets, Va	1 00
Clarksville, Va. to Durham, N. C	55 10
Oxford, N. C. to Henderson, N. C	12 75
Goldsboro, N. C. Cut-Off	1 55
Pomona, N. C. to North Wilkesboro, N. C	100 15
Murphy Junction, N. C. to Murphy, N. C	122 50
Charlotte, N. C. to Taylorsville, N. C	67 65
North Charlotte, N. C.—Cut Off	1 20
Hodges, S. C. to Abbeville, S. C	11 58
Aiken, S. C. to Edgefield, S. C	23 57
Embreeville Junction, Tenn, to Embreeville, Tenn.	13 00
Clinton, Tenn. to Harriman, Tenn	30 44
Coster, Tenn. to Cumberland Gap, Tenn	63 56

Knoxville, Tenn. to Jellico, Tenn	65.30
Chattanooga, Tenn. connection with C. N. O. & T. P. R. R. Co	.49
Coal Creek, Tenn. to Briceville, Tenn	3.10
La Follette, Tenn., to Vesper, Tenn	11.30
Near Newcombe, Tenn, Spur to Woolridge-Jellico Coal Co.	2.08
Morristown, Tenn. to Corryton, Tenn	39.60
Knoxville, Tenn. to Walland, Tenn	26.21
Cleveland, Tenn. to Cohutta, Ga	14.80
North Rome, Ga. to Attalla, Ala	61.30
Atlanta, Ga. to Fort Valley, Ga	102.30
Howell, Ga. to Armour, Ga	3.30
Cochran, Ga. to Hawkinsville, Ga	10.28
Villa Rica, Ga. to Mines of Virginia-Carolina Chemical Co.	2.92
Marion Junction, Ala. to Akron, Ala	53.00
Wilton, Ala. to Valley Creek Junction, Ala	37.28
Gurnee Junction, Ala. to Blocton, Ala	14.30
Woodlawn, Ala. to end of Belt Road, Bessemer, Ala.	20.50
North Birmingham, Ala. to Coalburg, Ala	6.40
Cardiff, Ala. to Brazil Mines, Ala.	1.60
Jefferson, Ala, to Blossburg, Ala	1.91
Patton Junction, Ala. to Patton, Ala	1.10
[fol. 91] Littleton, Ala. to Porter, Ala.	7.70
Henry Ellen, Ala. Spur to Mines of Tennessee Coal, Iron & Railroad Company	1.02
Spring Garden, Ala. to Mines of Alabama & Georgia Iron Co.	4.49
Lula, Ga. to Athens, Ga.	38.93
Ardella, Ala. to Hansell, Ala.	2.90
Seymour, Ala. Piper Spur	3.91
Spur, near Aden, Ala. to mines of the Galloway Coal Co.	.59
Spur near Oden, Ala. to Mines of the Bessemer Coal, Iron & Land Company	5.60
Pinners Point, Va. to connection with Atlantic Coast Line Ry.	.66
Louisville, Ky. to Cincinnati Southern Junction, Ky., (Southern Railway in Kentucky)	83.47
Lawrence, Ky. to Lexington, Ky. (Southern Railway in Kentucky)	23.72

Norton, Ky. to Burgin, Ky. (Southern Railway in Kentucky)	3.82
Versailles, Ky. to Georgetown, Ky. (Southern Railway in Kentucky)	16.74
Venice & Carondelet Belt, East St. Louis, Ill.	6.87
Connection with Chicago & Alton, Ry. to North Incline Terminal East St. Louis, Ill.	2.40
Belleville Junction, Ill. to Belleville, Ill.	1.14
East St. Louis, Ill. to Indiana State Line	146.71
Illinois State Line to New Albany, Ind. (Southern Ry. Ind.)	118.28
Rockport Junction, Ind. to Rockport, Ind. (Southern Ry. Ind.)	16.15
Jasper, Ind. to Evansville, Ind. (Southern Ry. Ind.)	54.22
Lincoln City, Ind. to Cannelton, Ind. (Southern Ry. Ind.)	22.72
Jasper, Ind. to French Lick, Ind. (Southern Ry. Ind.)	24.80
Forward	4,231.95

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Table 27—Miles of Road Operated June 30th, 1914

Brought forward	6,525.24
Lines Operated under Trackage Rights:	
Atlanta Terminal Company—Entrance Union Passenger Station Atlanta, Ga.	.50
Baltimore & Ohio Ry. Co.—Entrance to Passenger Station Harrisonburg, Va.	.50
[fol. 92] Phila. Balto. & Washington, D. C., to South end Potomac Bridge, Va.	2.14
Washington Terminal Company—Entrance to Union Passenger Station, Washington, D. C.	1.26
Washington Southern Railway: South end Potomac Bridge, Va. to Seminary Junction, Va.	5.70

Central of Georgia Railway:

Central Junction Ga. to West Broad Street Savannah, Ga.	3.37
Fort Valley Ga.	.10
	3.47

Augusta & Summerville Railroad—Entrance to Union Passenger Station, Augusta, Ga.	.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga.	.25
Western & Atlantic Railroad—W. & A. Crossing Ga. to Dalton, Ga.	.20
	......

Alabama Great Southern Railroad:

Entrance to Station, Attalla, Ala.	3.44
Woodlawn, Ala., to Birmingham, Ala.	2.11
York, Ala., to Meridian, Miss.	27.16
Central Passenger Station to Louisa Street, Chattanooga, Tenn.	.40
	33.11

Louisville & Nashville Railroad:

L. & N. Junction to Union Passenger Station, Florence, Ala.	.20
Cumberland Gap, Tenn., to Middlesboro, Ky. (Southern Ry. in Ky.)	4.41
Stony Fork and Hignite Branch, Ky.	10.41
Middlesboro Belt and Bennetts Fork Branch, Ky.	9.81
Halsey Branch, north of Jellico Yard, to Hyde, Tenn.	9.22
	34.05

[fol. 93] Atlantic Coast Line Railroad:

Pinners Point, Va., to Selma, N. C.	154.38
Hardeeville, S. C., to Central Junction, Ga.	16.70
Four Mile Crossing, Ga., to Union Passenger Station, Brunswick, Ga.	3.10
Central Junction, Ga., to Jacksonville Terminal Property line, Jacksonville, Fla.	152.08
Entrance to Union Passenger Station, Savannah, Ga.	.72
Central Junction, Ga., to end of double track	.09
	327.07

Northern Alabama Railway—N. A. Junction to Sheffield, Ala.	3.49
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss.	.65
Nashville, Chattanooga & St. Louis Railway—Chattanooga, Tenn., to Stevenson, Ala.	38.00
Jackson Terminal Company—Entrance to Union Passenger Station, Jacksonville, Fla	1.47
Memphis Union Station Company—Entrance to Union Passenger Station, Memphis, Tenn.	.55
Chattanooga Station Company—Entrance to Union Passenger Station, Chattanooga, Tenn.	.64
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.	4.48
St. Louis Terminal R. R. Association—St. Louis, Mo., to Relay Junction, East St. Louis, Ill.	3.18
East St. Louis & Cairo Railroad—Relay Junction to Broadway, East St. Louis, Ill.	.10
Jacksonville & St. Louis Railway—Through Centralia, Ill.	1.80
Baltimore & Ohio Southwestern Railroad—New Albany, Ind.	.06
Chicago & Alton Railway—Near East St. Louis, Ill.	.70
	.....

Evansville & Terre Haute Railroad:	
South Junction to West Junction, Princeton, Ind.	1.64
South Junction to Passenger Station, Evansville, Ind.	.63
	......
Illinois Central Railroad: Eleventh Street to Seventh Street Union Passenger Station, Louisville, Ky.	.50
	......
[fol. 94] Kentucky & Indiana Terminal Railroad:	
Vincennes Street, New Albany, Ind., to Eleventh Street, Louisville, Ky.	3.00
Louisville, Ky.	6.90
	9.90
Cincinnati, New Orleans & Texas Pacific Railway:	
Cincinnati Southern Junction, Ky., to Danville, Ky.	4.88
Chattanooga, Tenn.	2.29
	7.17
Chicago, Indianapolis & Louisville Railway—French Lick, Ind., to West Baden, Ind.	1.00
	484.70
Total Miles of Road Operated	7,009.94

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Report of the Vice-President and General Manager

Washington, D. C., October 1, 1915.

Mr. Fairfax Harrison, President, Washington, D. C.

Dear Sir: There is submitted herewith a report of the operations of Southern Railway Company for the year ended June 30, 1915:

Miles of Road Operated June 30, 1915

Location of lines	Owned	Leased or otherwise controlled	Operated under trackage rights	Total miles operated
District of Columbia	......	......	3.40	3.40
Virginia	565.29	276.84	42.65	884.78
North Carolina	595.39	739.41	120.88	1,455.68
South Carolina	358.40	765.01	5.01	1,128.42
Georgia	655.49	257.03	145.45	1,057.97
Florida	......	......	41.81	41.81
Alabama	822.39	183.77	31.44	1,037.60
Mississippi	71.92	11.40	19.58	102.90
Tennessee	669.00	35.17	31.33	736.50
Kentucky	127.63	2.09	40.98	170.70
[fol. 95] Indiana	236.17	......	3.33	239.89
Illinois	157.11	......	5.78	162.89
Miles Operated June 30, 1915	4,258.79	2,271.72	491.64	7,022.15
Miles Operated June 30, 1914	4,231.95	2,293.29	484.70	7,009.94
Increase	26.84	......	6.94	12.21
Decrease	.....	21.57	......	.....

In addition to the railroad operated by it, the Company owns the following lines which are leased to and operated by other companies:

	Miles
Orange, Va., to Gordonsville, Va.—Chesapeake & Ohio Railway Company	9.40
Alexandria, Va., to Bluemont, Va.—Washington & Old Dominion Railway	54.55
Anderson, S. C., to Belton, S. C.—Blue Ridge Railway Company	9.98
Bulls Gap, Tenn., to Rogersville, Tenn.—Virginia & Southwestern Railroad Company	14.10

	Miles
Gretna, Va., to Pittsville, Va.,—Franklin & Pittsylvania Railroad Company	7.10
Total Mileage Leased to and Operated by Other Companies	95.13

The Increase in Miles Operated was occasioned by:

Additional Trackage rights acquired:	
From the Atlantic Coast Line Railroad Company—Goldsboro, N. C.	.20
From the Seaboard Air Line Railway—Richmond, Va.	.50
From the Chesapeake & Ohio Railway Company—Richmond, Va.	2.00
From the Cincinnati, New Orleans & Texas Pacific Railway Company—Lexington, Ky. to Junction City, Ky.	.62
	3.32
Reclassification to conform to requirements of Federal Commission	22.05
Remeasurement	1.76
	27.13
[fol. 96] Less:	
Spur to lines of Tennessee Coal, Iron and Railroad Company, Henry Ellen, Ala., Abandoned and removed	1.02
Line Bushnell, N. C., to Fontana, N. C., operated separately since March 1, 1915	13.90
	14.92
Net Increase in Miles Operated	12.21

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Miles of Road June 30, 1915

	Miles
Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	282.47
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway)	54.55
Cameron Run Bridge, Va., to Alexandria Freight Depot—Union St. Branch	4.40
Manassas Junction, Va., to Harrisonburg, Va.	112.89
Calverton, Va., to Warrenton, Va	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.)	9.40
Leftwich Junction, Va., to Durmid, Va.	5.44
Gretna, Va. to Pittsville, Va. (leased to Franklin & Pittsylvania R. R. Co.)	7.10
Pomona, N. C. via Winston-Salem to Wilkesboro, N. C.	100.15
Neapolis, Va., via Keysville, Va. to West Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va.	1.00
Pinners Point, Va. connection with Atlantic Coast Line Railroad	.66
Shoulders Hill, Va., to Portsmouth, Va.	10.02
Clarksville, Va. to Durham, N. C.	55.10
Oxford, N. C. to Henderson, N. C.	1.55
Goldsboro, N. C., Cut-off	1.55
Salisbury, N. C. via Statesville and Asheville, N. C., to Morristown, Tenn.	231.37
Charlotte, N. C. via Statesville, N. C. to Taylorsville, N. C.	65.65
Murphy Junction, N. C. to Murphy, N. C.	122.50

	Miles
Charlotte, N. C. via Columbia, S. C. to Augusta, Ga.	190.49
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20
[fol. 97] Aiken, S. C., via Trenton, S. C. to Edgefield, S. C.	23.57
Columbia, S. C. via Greenwood, S. C. to Greenville, S. C.	143.52
Hodges, S. C. to Abbeville, S. C.	11.58
Anderson, S. C. to Belton, S. C. (leased to the Blue Ridge Railway Co.)	9.98
Lula, Ga., to Athens, Ga	38.93
Bristol, Tenn., via Knoxville, to Chattanooga, Tenn.	242.04
Embreeville Junction, Tenn., to Embreeville, Tenn.	13.00
Bulls Gap, Tenn., to Rogersville, Tenn. (leased to Virginia & Southwestern Ry. Co.)	14.10
Morristown, Tenn. to Corryton, Tenn.	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30
Coster, Tenn., to Cumberland Gap Junction, Tenn.	63.56
Clinton, Tenn., to Harriman Junction, Tenn.	30.44
Coal Creek, Tenn., to Briceville, Tenn.	3.10
Briceville, Tenn., to Minersville, Tenn.	2.84
Briceville Y, Tenn., to Cambria, Tenn.	3.02
Near Newcomb, Tenn., Spur to Wooldridge—Jellico Coal Co.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga	14.80
Stevenson, Ala., to Memphis, Tenn.	271.75
Moscow, Tenn., to Somerville, Tenn.	13.10
Tuscumbia, Ala., to Sweetwater, Ala	8.30
Ooltewah Junction, Tenn., to Brunswick, Ga.	412.30
North Rome, Ga., to Attalla, Ala.	61.30
Atlanta, Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30

	Miles
Cochran, Ga., to Hawkinsville, Ga	10.28
Dock Branch—Dock Junction, Ga., to Turtle River Docks, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Mississippi State Line	260.70
Villa Rica, Ga., to Mines of Virginia-Carolina Chemical Co.	2.92
Jefferson, Ala., to Blossburg, Ala.	1.91
Woodlawn, Ala., to end of Belt Road Bessemer, Ala.	20.50
North Birmingham, Ala., to Coalburg, Ala.	6.40
[fol. 98] Cardiff, Ala., to Brazil Miles, Ala.	1.60
Littleton, Ala., to Porter, Ala.	7.70
Patton Junction, Ala., to Patton, Ala.	1.10
Atlanta Junction, Ga., via Selma, Ala., to York, Ala.	270.50
Spring Garden, Ala., to Mines, Alabama & Georgia Iron Co.	4.49
Wilton, Ala., to Valley Creek Junction, Ala.	37.28
Gurnee Junction, Ala., to Blocton, Ala.	14.30
Seymour, Ala., to end of track, Piper Spur	3.91
Badham Spur, Ala.	5.60
Galloway Coal Co. Spur	.59
Ardella, Ala., to Hansell, Ala.	2.70
Marion Junction, Ala., to Akron, Ala.	53.00
Louisville, Ky., to Cincinnati Southern Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.82
New Albany, Ind., to Illinois State Line, (So. Ry. of Ind.)	118.28
Jasper, Ind., to West Baden, Ind. (So. Ry. of Ind.)	24.80

	Miles	
Jasper, Ind., to Evansville, Ind. (So. Ry. of Ind.)	54.22	
Lincoln City, Ind., to Cannelton, Ind. (So. Ry. of Ind.)	22.72	
Rockport Junction, Ind., to Rockport, Ind. (So. Ry. of Ind.)	16.15	
	4,158.99	
Brought forward		4,158 99
East St. Louis, Ill., to Indiana State Line	146.71	
Belleville Junction, Ill., to Belleville, Ill.	1.14	
Venice & Carondelet, Belt at East St. Louis, Ill.	6.86	
Connection with Chicago & Alton Ry., to North Incline Terminal, East St. Louis, Ill.	2.40	
Okolona, Miss., to Calhoun City, Miss.	37.82	
Total Mileage Owned		4,353.92
Total Owned Mileage Operated	4,258.79	
Total Owned Mileage Leased to Other Companies	95.13	

[fol. 99] Controlled by Ownership of Securities

(a) Leased:

Southern Railway—Carolina Division:		
Kingville, S. C., via Sumter Junction and Blacksburg, S. C., to Marion, N. C.	208.50	
Sumter Junction, S. C., to Sumter, S. C.	15.81	
Blacksburg, S. C., to Gaffney, S. C.	10.50	
Branchville, S. C., via Kingville to Columbia, S. C.	66.30	
Biltmore, N. C., to Spantanburg Junction, S. C.	65.72	
Hendersonville, N. C., to Lake Texaway, N. C.	42.10	

		Miles	
Spartanburg, S. C., to Alston, S. C.		67.93	
Charleston, S. C., to Augusta, Ga.		136.90	
Kaolin, S. C., to Immaculate Mines, S. C.		2.60	
Burton Branch		5.20	
Cayce, S. C., via Blackville, to Hardeeville, S. C.		128.63	
Perry, S. C., to Sievern, S. C.		7.64	
Total		757.83	
Elberton Southern Railway—Tococoa, Ga., to Elberton, Ga.		50.60	
Mobile & Birmingham Railroad—Marion Junction, Ala., to Mobile, Ala.		150.35	
Richmond & Mecklenburg Railroad—Keysville, Va., to Clarksville, Va.		31.30	
Georgia Midland Railway—McDonough, Ga., to Columbus, Ga.		97.88	
		1,087.96	1,087.96
(b) Not Leased:			
State University Railroad—University, N. C., to Chapel Hill, N. C.		10.20	
North Carolina Midland Railroad—Mooresville, N. C., to Winston-Salem, N. C.		53.52	
Highpoint, Randleman, Asheboro & Southern R. R.—High Point, N. C., to Asheboro, N. C.		27.59	
Yadkin Railroad—Salisbury, N. C., to Norwood, N. C.		41.00	
Sievern & Knoxville Railroad—Batesburg, S. C., to Sievern, S. C.		17.44	
[fol. 100] Atlantic & Yadkin Railway:			
Sanford, N. C., to Mt. Airy, N. C	130.95		
Mt. Airy, N. C., to Woodroffe, N. C	2.02		
Climax, N. C., to Ramseur, N. C	18.74		

		Miles	
Stokesdale, N. C., to Madison, N. C	11.39		
		163.10	
Ensley Southern Railway:			
Ensley, Ala., to near Warrior River Ala	22.73		
Parrish, Ala., to near Warrior River, Ala	9.24		
Coal Creek Spur, Ala	1.45		
		33.42	
Roswell Railroad:			
Chamblee, Ga., to Roswell, Ga	9.80		
Morgans Falls Branch, Ga.	2.75		
		12.55	
Cumberland Railway—Hyde, Tenn., to point on main stream Clear Creek, Ky.		11.21	
Tennessee & Carolina Southern Railway—Maryville, Tenn., to Chilhowee, Tenn.		25.30	
			395.33
Operated under Agreement:			
Southern Railway Company in Mississippi—Columbus, Miss., to Alabama State Line			11.40
Total Mileage covered by Southern Railway Company Securities			5,848.61
Miles Operated		5,753.48	
Mileage Leased to and Operated by Other Companies		95.13	

Leased:

		Miles	
North Carolina Railroad:			
Goldsboro, N. C., via Greensboro and Salisbury to Charlotte, N. C.	218.87		
Caraleigh Junction, N. C., to Caraleigh, N. C	1.90		
		220.77	
[fol. 101] Atlanta & Charlotte Air Line Railway—Charlotte, N. C., to Armour, Ga.		263.08	
Atlantic & Danville Railway:			
Danville, Va., to West Norfolk, Va.	205.10		
James River Junction, Va., to Clermont Wharf, Va. (Narrow Gauge)	50.36		
Hitchcock Branch Junction, Va., to Hitchcock Mills, Va.	8.33		
Buffalo Junction, Va., to Buffalo Lithia Springs, Va.	3.90		
		267.69	
North & South Carolina Railroad—Virgilina, Va., to Mines, N. C.		3.73	
Lockhart Railroad—Lockhart Junction, S. C., to Lockhart, S. C.		13.81	
The Whitney Company—Near New London, N. C., to Hall's Mill Ferry, N. C.		6.20	
Woolridge-Jellico Coal Company—Spur near Newcomb, Tenn.		1.75	
			777.03
			6,625.64

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Miles of Road, June 30, 1916

Owned:

	Miles
Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	278.58
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway)	54.55
Cameron Run Bridge, Va., to Alexandria Freight Depot—Union St. Branch	4.40
Manassas Junction, Va., to Harrisonburg, Va.	111.85
Front Royal Branch, Va	1.04
Calverton, Va., to Warrenton, Va.	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.)	9.40
Leftwich Junction, Va., to Durmid, Va.	5.44
Gretna, Va., to Pittsville, Va. (leased to Franklin & Pittsylvania R. R. Co.)	7.10
Neapolis, Va., via Keysville, Va., to West Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va.	1.57
Clerksville, Va., to Durham, N. C.	55.10
Oxford, N. C., to Henderson, N. C.	12.75
[fol. 102] Pomona, N. C., via Winston-Salem, to Wilkesboro, N. C.	100.15
Pinners Point, Va., connection with Atlantic Coast Line Railroad	.66
Goldsboro, N. C., Cut-off	1.55
Salisbury, N. C., via Statesville and Asheville, N. C., to Morristown, Tenn.	228.40
Morristown, Tenn., Cut-off	2.97
Charlotte, N. C., via Statesville, N. C., to Taylorsville, N. C.	65.65
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20
Murphy Junction, N. C., to Murphy, N. C.	122.50
Charlotte, N. C., via Columbia, S. C., to Augusta, Ga.	190.49
Aiken, S. C., via Trenton, S. C., to Edgefield, S. C.	23.57
Columbia, S. C., via Greenwood, S. C., to Greenville, S. C.	143.52

	Miles
Hodges, S. C., to Abbeville, S. C.	11.58
Anderson, S. C., to Belton, S. C. (leased to Blue Ridge Railway Co.)	9.98
Lula, Ga., to Athens, Ga.	38.93
Bristol, Tenn., via Knoxville, to Chattanooga, Tenn.	241.55
Embreeville Junction, Tenn., to Embreeville, Tenn.	13.00
Bulls Gap, Tenn., to Rogersville, Tenn. (leased to Virginia & Southwestern Ry. Co.)	14.10
Morristown, Tenn., to Corryton, Tenn	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30
Coster, Tenn., to Cumberland Gap Junction, Tenn.	63.50
Clinton, Tenn., to Harriman Junction, Tenn.	30.40
Coal Creek, Tenn., to Briceville, Tenn.	3.10
Briceville, Tenn., to Minersville, Tenn.	2.84
Briceville Y, Tenn., to Cambria, Tenn	3.02
Spur to Woolridge—Jellico Coal Co. near Newcomb, Tenn.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga.	14.80
Chattanooga, Tenn., connection with C. N. O. & T. P. Ry.	.49
Stevenson, Ala., to Memphis, Tenn.	271.69
Near Tuscumbia, Ala., connection with Northern Alabama Railway	.06
Tuscumbia, Ala., to Sweetwater, Ala.	8.30
Moscow, Tenn., to Somerville, Tenn.	13.10
Ooltewah Junction, Tenn., to Brunswick, Ga.	412.30
Forrestville, Ga., to Attalla, Ala.	61.30
Atlanta (Roseland) Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30
Cochran, Ga., to Hawkinsville, Ga.	10.28
Dock Branch—Dock Junction, Ga., to Turtle River Docks, near Brunswick, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Mississippi State Line	260.70
[fol. 103] Villa Rica, Ga., to Mines of Virginia-Carolina Chemical Co	2.92

	Miles
Woodlawn Junction, Ala., to end of Belt Road Bessemer, Ala	20.50
North Birmingham, Ala., to Coalburg, Ala	6.40
Cardiff, Ala., to Brazil Mines, Ala	1.60
Jefferson, Ala., to Blossburg, Ala	1.91
Littleton, Ala., to Porter, Ala	7.70
Patton Junction, Ala., to Patton, Ala	1.10
Atlanta Junction, Ga., via Selma, Ala., to York, Ala.	270.50
Spring Garden, Ala., to Mines of Alabama & Georgia Iron Co.	4.49
Wilton, Ala., to Valley Creek Junction, Ala.	37.28
Gurnee Junction, Ala., to Blocton, Ala.	14.30
Seymour, Ala., to end of track, Piper Spur	3.91
Badham Spur, Ala.	5.60
Galloway Coal Co. Spur near Aden, Ala.	.59
Ardela, Ala., to Hansell, Ala.	2.70
Marion Junction, Ala., to Akron, Ala.	53.00
Louisville, Ky., to Cincinnati Southern Junction, Ky (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.83
New Albany, Ind., to Illinois State Line, (So. Ry. of Ind.)	118.28
Jasper, Ind., to French Lick, Ind. (So. Ry. of Ind.)	24.03
Jasper, Ind., to Evansville, Ind. (So. Ry. in Ind.)	54.68
Lincoln City, Ind., to Cannelton, Ind., (So. Ry. of Ind.)	22.72
Rockport Junction, Ind., to Rockport, Ind. (So. Ry. of Ind.)	16.15
	4,145.35
Brought forward	4,145.35
East St. Louis, Ill., to Indiana State Line	146.71
Belleville Junction, Ill., to Belleville, Ill.	1.14
Venice & Carondelet Belt at East St. Louis, Ill.	6.86

	Miles
Connection with Chicago & Alton Ry., to North Incline Terminal, East St. Louis, Ill.	2.40
Okolona, Miss., to Calhoun City, Miss.	37.82
Total Mileage Owned	4,340.28
Total Owned Mileage Operated	4,245.15
Total Owned Mileage Leased to Other Companies	95.13

[fol. 104] Page 57 of the Twenty-second Annual Report of the Southern Railway Company Ended June 30, 1916

Operated under Trackage Rights

Atlanta Terminal Company—Entrance to Union Passenger Station, Atlanta, Ga.		.50
Baltimore & Ohio Railroad—Entrance to Passenger Station, Harrisonburg, Va.		.50
Phila., Balto. & Washington R. R.—Washington, D. C. to South end Potomac Bridge, Va.		2.14
Washington Terminal Company—Entrance to Union Passenger Station, Washington, D. C.		1.26
Washington Southern Railway—South end Potomac Bridge, Va. to Seminary Junction, Va.		5.70
Seaboard Air Line Railway—Rocketts, Va. to Main St. Station, Richmond, Va.		.50
Chesapeake & Ohio Railway—Park Siding, Va. to Main St. Station, Richmond, Va		2.00
Central of Georgia Railway:		
Chattanooga, Tenn.	.60	
Central Junction, Ga. to West Broad Street, Savannah, Ga.	3.37	
Fort Valley, Ga.	.10	
		4.07
Augusta & Summerville Railroad—Entrance to Union Passenger Station, Augusta, Ga.		.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga.		.25
Western & Atlantic Railroad—W. & A. Crossing, Ga., to Dalton, Ga.		.20

		Miles
Alabama Great Southern Railroad:		
Entrance to Station, Attalla, Ala.	3.44	
Woodlawn, Ala., to Birmingham, Ala.	2.11	
York, Ala. to Meridian, Miss.	27.16	
Central Passenger Station to Louisa Street, Chattanooga, Tenn.	.40	
Near Wauhatchie, Tenn. to Memphis-Chattanooga Junction, Tenn.	2.15	
Connection Memphis-Chattanooga Ry. to connection Central of Georgia Ry. near Chattanooga, Tenn.	.77	
		36.03
Louisville & Nashville Railroad:		
Cumberland Gap, Tenn. to Middlesborough, Ky, (So. Ry. in Ky.)	4.41	
Stony Fork and Hignite Branch, Ky.	10.41	
[fol. 105] Middlesborough Belt and Bennetts Fork Branch, Ky.	9.81	
Halsey Branch, north of Jellico Yard to Hyde, Tenn.	9.22	
		33.85
Atlantic Coast Line Railroad:		
Pinners Point, Va. to Selma, N. C.	154.38	
Hardeeville, S. C. to Central Junction, Ga.	16.70	
Four Mile Crossing, Ga. to Union Passenger Station, Brunswick, Ga.	3.10	
Central Junction, Ga. to Jacksonville, Terminal property line, Jacksonville, Fla.	152.08	
Entrance to Union Passenger Station, Savannah, Ga	.72	
Central Junction, Ga. to end of double track	.09	

		Miles
Entrance to Union Passenger Station, Goldsboro, N. C.	.20	
		327.27
North Alabama Railway—N. A. Junction to Sheffield, Ala.		3.49
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss.		.65
Nashville, Chattanooga & St. Louis Railway—Chattanooga, Tenn. to Stevenson, Ala.		38.00
Jacksonville Terminal Company—Entrance to Union Passenger Station, Jacksonville, Fla.		147
Memphis Union Station Company—Entrance to Union Passenger Station, Memphis, Tenn.		.55
Chattanooga Station Company—Entrance to Union Passenger Station, Chattanooga, Tenn.		.87
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.		4.48
Terminal Railroad Association of St. Louis—St. Louis, Mo. to Broadway, East St. Louis, Ill.		3.20
Jacksonville & St. Louis Railway—through Centralia, Ill.		1.80
Baltimore & Ohio Southwestern Railroad—New Albany, Ind.		.06
Chicago & Alton Railway—Near East St. Louis, Ill.		.70
Evansville & Terre Haute Railroad:		
South Junction to West Junction, Princeton, Ind.	1.64	
South Junction to Passenger Station, Evansville, Ind	.63	
		2.27
[fol. 106] Illinois Central Railroad—Eleventh Street to Seventh Street Union Passenger Station, Louisville, Ky		.50
Kentucky and Indiana Terminal Railroad:		
Vincennes Street, New Albany, Ind. to Eleventh Street, Louisville, Ky.	3.00	
Louisville, Ky.	4.53	
		7.53

		Miles
Cincinnati, New Orleans & Texas Pacific Railway:		
Entrance to Station, Burgin, Ky.	.23	
Cincinnati Southern Junction, Ky. to Danville, Ky.	4.88	
Chattanooga, Tenn.	2.29	
Lexington Junction, Ky. to Lexington, Ky. (So. Ry. in Ky.)	.62	
		8.02
St. John's River Terminal—Near Grand Crossing, Fla. to Bay St. Freight Depot, Jacksonville, Fla.		5.99
Chicago, Indianapolis & Louisville Railway—French Lick, Ind. to West Baden, Ind.		1.00
		495.42

Total Miles of Road	7,135.35
Total Miles of Road Operated	7,038.86
Total Miles Leased to and Operated by Other Companies	96.49

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Table 29—Miles of Road June 30, 1917

Owned:

Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	278.58
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway)	54.55
Cameron Run Bridge, Va., to Alexandria Freight Depot—Union St. Branch	4.40
Manassas Junction, Va., to Harrisonburg, Va	111.85
Front Royal Branch, Va.	1.04
Calverton, Va., to Warrenton, Va.	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.)	9.40
Leftwich Junction, Va., to Durmid, Va.	5.44
Gretna, Va., to Pittsville, Va. (leased to Franklin & Pittsylvania R. R. Co.)	7.10

	Miles
Neapolis, Va. via Keysville, Va., to West Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va.	1.57
[fol. 107] Clarksville, Va., to Durham, N. C.	55.10
Oxford, N. C., to Henderson, N. C.	12.75
Pomona, N. C., via Winston-Salem, to North Wilkesboro, N. C.	100.15
Pinners Point, Va., connection with Atlantic Coast Line Railroad	.66
Goldsboro, N. C., cut-off	1.55
Salisbury, N. C., via Statesville and Asheville, N. C., to Morristown, Tenn.	228.40
Morristown, Tenn., Cut-off	2.97
Charlotte, N. C., via Statesville, N. C., to Taylorsville, N. C.	65.65
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20
Murphy Junction, N. C., to Murphy, N. C.	122.50
Charlotte, N. C., via Columbia, S. C., to Augusta, Ga.	190.40
Aiken, S. C., via Trenton, S. C., to Edgefield, S. C.	23.57
Columbia, S. C., via Greenwood, S. C., to Greenville, S. C.	143.52
Kaolin, S. C., to Immaculate Mines, S. C.	2.60
Hodges, S. C., to Abbeyville, S. C.	11.58
Anderson, S. C., to Belton, S. C. (leased to Blue Ridge Railway Company)	9.98
Lula, Ga., to Athens, Ga.	38.93
Bristol, Tenn., via Knoxville, to Chattanooga, Tenn.	241.55
Embreeville Junction, Tenn., to Embreeville, Tenn.	13.00
Bulls Gap, Tenn., to Rogersville, Tenn.	14.10
Morristown, Tenn., to Corryton, Tenn.	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30
Coster, Tenn., to Cumberland Gap Junction, Tenn.	63.56
Clinton, Tenn., to Harriman Junction, Tenn.	30.44
Coal Creek, Tenn., to Briceville, Tenn.	3.10
Briceville, Tenn., to Minersville, Tenn.	2.84
Briceville, Tenn., to Cambria, Tenn.	3.02

	Miles
Spur to Woolridge—Jellico Coal Co. near Newcomb, Tenn.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga.	14.80
Chattanooga, Tenn., connection with C. N. O. & T. P. R. R.	.49
Stevenson, Ala., to Memphis, Tenn.	271.69
Near Tuscumbia, Ala., connection with Northern Alabama Railway	.06
Tuscumbia, Ala., to Sweetwater, Ala.	8.30
Moscow, Tenn. to Somerville, Tenn.	13.10
Ooltewah Junction, Tenn., via Atlanta, Ga., to Brunswick, Ga.	412.30
Forrestville, Ga., to Attalla, Ala.	61.30
Atlanta (Roseland), Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30
Cochran, Ga., to Hawkinsville, Ga.	10.28
[fol. 108] Dock Branch—Dock Junction, Ga., to Turtle River Docks near Brunswick, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Mississippi State Line	260.70
Villa Rica, Ga., to Mines of Virginia-Carolina Chemical Co.	2.92
Woodlawn Junction, Ala., to end of Belt Road, Bessemer, Ala.	20.50
North Birmingham, Ala., to Coalburg, Ala.	6.40
Cardiff, Ala., to Brazil Mines, Ala.	1.60
Jefferson, Ala., to Blossburg, Ala.	1.91
Littleton, Ala., to Porter, Ala.	7.70
Patton Junction, Ala., to Patton, Ala.	1.10
Atlanta Junction, Ga., via Selma, Ala., to York, Ala.	270.50
Spring Garden, Ala., to Mines of Alabama & Georgia Iron Co.	4.49
Wilton, Ala., to Valley Creek Junction, Ala.	37.28
Gurnee Junction, Ala., to Blocton, Ala.	14.30
Seymour, Ala., to end of track, Piper Spur	3.91
Badham Spur, Ala.	5.60
Galloway Coal Co. Spur near Aden, Ala.	.59
Ardela, Ala., to Hansell, Ala.	2.70
Marion Junction, Ala., to Akron, Ala.	53.00

	Miles
Louisville, Ky., to Cincinnati Southern Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.83
New Albany, Ind., to Illinois State Line (So. Ry. in Ind.)	118.28
Jasper, Ind., to French Lick, Ind. (So. Ry. in Ind.)	24.03
Jasper, Ind., to Evansville, Ind. (So. Ry. in Ind.)	54.68
Lincoln City, ~~Ind.~~, to Cannelton, Ind. (So. Ry. in Ind.)	22.72
Rockport Junction, Ind., to Rockport, Ind	16.15
Forward	4,147.95
Brought Forward	4,147.95
East St. Louis, Ill., to Indiana State Line	146.71
Belleville Junction, Ill., to Belleville, Ill.	1.14
Venice & Carondelet Belt & East St. Louis, Ill.	6.86
Connection with Chicago & Alton Ry. to North Incline Terminal, East St. Louis, Ill.	2.40
Okolona, Miss., to Calhoun City, Miss. (operated by Mobile & Ohio R. R. as Agent)	37.82
Total Mileage Owned	4,342.88
Total Mileage Operated	4,224.03
Total Owned Mileage Leased to and Operated by other Companies	118.85

[fol. 109] Page 53, Twenty-third Annual Report of the Southern Railway Company, Year Ended June 30th, 1917

Table 29—Miles of Road June 30, 1917

Brought Forward	6,585.58
Operated under Trackage Rights	
Atlanta Terminal Company—Entrance to Union Passenger Station, Atlanta, Ga.	.50

	Miles
Baltimore & Ohio Railroad—Entrance to Passenger Station, Harrisonburg, Va.	50
Phila., Balto. & Washington R. R.—Washington, D. C. south end Potomac Bridge, Va.	2.14
Washington Terminal Co.—Entrance to Union Passenger Station, Washington, D. C.	1.26
Washington Southern Railway—South End Potomac Bridge, Va. to Seminary Junction, Va.	5.70
Seaboard Air Line Railway—Rocketts, Va. to Main St. Station, Richmond, Va.	.50
Chesapeake & Ohio Railway—Park Siding, Va. to Main St. Station, Richmond, Va.	2.00
Central of Georgia Railway:	
Chattanooga, Tenn.	.60
Central Junction, Ga., to West Broad St. Savannah, Ga.	3.37
Fort Valley, Ga.	.10
	4.07
Augusta & Summerville Railroad—Entrance to Union Passenger Station, Augusta, Ga.	.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga.	.25
Western & Atlantic Railroad—W. & A. Crossing, Ga. to Dalton, Ga.	.20
Alabama Great Southern Railroad:	
Entrance to Station, Attalla, Ala.	3.44
Woodlawn, Ala. to Birmingham, Ala.	2.11
York, Ala. to Meridian, Miss.	27.16
Central Passenger Station to Louisa Street, Chattanooga, Tenn.	.40
Near Wauhatchie, Tenn. to Memphis, Chattanooga, Junction, Tenn.	2.15
Connection Memphis-Chattanooga, Ry. to connection Central of Georgia Ry. near Chattanooga, Tenn.	.77
	36.03

[fol. 110] Louisville & Nashville Railroad:

	Miles
Cumberland Gap, Tenn. to Middlesborough, Ky. (So. Ry. in Ky.)	4.41
Stony Fork and Hignite Branch, Ky.	10.41
Middlesborough Belt and Bennetts Fork Branch, Ky.	9.81
Halsey Branch, north of Jellico Yard, to Hyde, Tenn.	9.22
Appalachia, Va. to Norton, Va.	10.00
	43.85

Atlantic Coast Line Railroad:

Pinners Point, Va. to Selma, N. C.	154.38
Hardeeville, S. C. to Central Junction, Ga.	16.70
Four Mile Crossing, Ga., to Union Passenger Station, Brunswick, Ga.	3.10
Central Junction, Ga. to Jacksonville Terminal property line, Jacksonville, Fla.	152.08
Entrance to Union Passenger Station, Savannah, Ga.	.72
Central Junction, Ga., to end of double track	.09
Entrance to Union Passenger Station, Goldsboro, N. C.	.20
	327.27

Northern Alabama Railway—N. A. Junction to Sheffield, Ala.	3.49
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss.	.65
Nashville, Chattanooga & St. Louis Railway—Chattanooga, Tenn., to Stevenson, Ala.	38.00
Jacksonville Terminal Co.—Entrance to Union Passenger Station, Jacksonville, Fla.	1.47
Memphis Union Station Company—Entrance to Union Passenger Station, Memphis, Tenn.	.55
Chattanooga Station Company—Entrance to Union Passenger Station, Chattanooga, Tenn.	.87
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.	4.48

	Miles
Terminal Railroad Association of St. Louis, Mo. to Broadway, East St. Louis, Ill.	3.28
Jacksonville & St. Louis Railway—Through Centralia, Ill.	1.80
Baltimore & Ohio Southwestern Railroad—New Albany, Ind.	.06
Chicago & Alton Railway—Near East St. Louis, Ill.	.70
[fol. 111] Evansville & Terra Haute Railroad:	
South Junction to West Junction, Princeton, Ind.	1.64
South Junction to Passenger Station, Evansville, Ind.	.63
	2.27
Illinois Central Railroad:	
Eleventh Street to Seventh Street Union Passenger Station, Louisville, Ky.	.50
Kentucky & Indiana Terminal Railroad:	
Vincennes Street, New Albany, Ind., to Eleventh Street, Louisville, Ky.	3.00
Louisville, Ky.	4.53
	7.53
Cincinnati, New Orleans & Texas Pacific Railway:	
Entrance to Station, Burgin, Ky.	.23
Cincinnati Southern Junction, Ky. to Danville, Ky.	4.88
Chattanooga, Tenn.	2.29
Lexington Junction, Ky. to Lexington, Ky. (So. Ry. in Ky.)	.62
	8.02
St. John's River Terminal—Near Grand Crossing, Fla. to Bay St. Freight Depot, Jacksonville, Fla.	5.99

	Miles
Chicago, Indianapolis & Louisville Railway—French Lick, Ind. to West Baden, Ind.	1.00
Norfolk & Western Railway—Norton, Va. to Toms Creek, Va.	12.08
	517.50
Total Miles of Road	7,103.08
Total Miles of Road Operated	6,982.87
Total Miles Leased to and Operated by Other Companies	120.21

[fol. 112] Page 19 of the Twenty-fifth Annual Report of the Southern Railway Company, Ended December 31, 1918

Miles of Road

Owned:

Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	278.58
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway)	53.27
Cameron Run Bridge, Va., to Alexandria Freight Depot—Union St. Branch	4.40
Manassas Junction, Va., to Harrisonburg, Va.	111.85
Front Royal Branch, Va.	1.04
Calverton, Va., to Warrenton, Va.	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.)	9.40
Leftwich Junction, Va., to Durmid, Va.	5.44
Gretna, Va., to Pittsville, Va. (leased to Franklin & Pittsylvania R. R. Co.)	7.10
Neapolis, Va., via Keysville, Va., to W[illegible]t Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va.	1.57
Clarksville, Va., to Durham, N. C.	55.10
Oxford, N. C., to Henderson, N. C.	112.75
Pomona, N. C., via Winston-Salem, to North Wilkesboro, N. C.	100.15
Pinners Point, Va., connection with Atlantic Coast Line Railroad	.66
Goldsboro, N. C., Cut-off	1.55

	Miles
Salisbury, N. C., via State svo; ;e amd Asheville, N. C., to Morristown, Tenn.	228.40
Morristown, Tenn., Cut-off	2.97
Charlotte, N. C., via Statesville, N. C., to Taylorsville, N. C.	65.65
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20
Murphy Junction, N. C., to Murphy, N. C.	122.50
Charlotte, N. C., via Columbia, S. C., to Augusta, Ga.	190.49
Aiken, S. C., via Trenton, S. C., to Edgefield, S. C.	23.57
Columbia, S. C., via Greenwood, S. C., to Greenville, S. C.	143.52
Kaolin, S. C., to Immaculate Mines, S. C.	2.60
Hodges, S. C., to Abbeyville, S. C.	11.58
Anderson, S. C., to Belton, S. C. (leased to Blue Ridge Railway Co.)	9.98
Lula, Ga., to Athens, Ga.	38.93
Bristol, Tenn., via Knoxville, to Chattanooga, Tenn.	241.55
Embreeville Junction, Tenn., to Embreeville, Tenn.	13.00
Bulls Gap, Tenn., to Rogersville, Tenn.	14.10
Morristown, Tenn., to Coryton, Tenn.	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30
[fol. 113] Coster, Tenn., to Cumberland Gap Junction, Tenn.	63.56
Clinton, Tenn., to Harriman Junction, Tenn.	30.44
Coal Creek, Tenn., to Briceville, Tenn.	3.10
Briceville, Tenn., to Minersville, Tenn.	2.84
Briceville Y, Tenn., to Cambria, Tenn.	3.02
Spur to Wooldridge-Jellico Coal Co., near Newcomb, Tenn.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga.	14.80
Chattanooga, Tenn., connection with C. N. O. & T. P. Ry.	.49
Stevenson, Ala., to Memphis, Tenn.	271.69
Near Tuscumbia, Ala., connection with Northern Alabama Railway	.06
Tuscumbia, Ala., to Sweetwater, Ala.	8.30

	Miles
Moscow, Tenn., to Somerville, Tenn.	13.10
Ooltewah Junction, Tenn., via Atlanta, Ga., to Brunswick, Ga.	412.30
Forrestville, Ga., to Attalla, Ala.	61.30
Atlanta (Roseland), Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30
Cochran, Ga., to Hawkinsville, Ga.	10.28
Dock Branch—Dock Junction, Ga., to Turtle River Docks, near Brunswick, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Mississippi State Line	260.70
Villa Rica, Ga., to Lines of Virginia-Carolina Chemical Co.	2.92
Woodlawn Junction, Ala., to end of Belt Road, Bessemer, Ala.	20.50
North Birmingham, Ala., to Coalburg, Ala.	6.40
Cardiff, Ala., to Brazil Mines, Ala.	1.60
Jefferson, Ala., to Blossburg, Ala.	1.91
Littleton, Ala., to Porter, Ala.	7.70
Patton Junction, Ala., to Patton, Ala.	1.10
Atlanta Junction, Ga., via Selma, Ala., to York, Ala.	270.50
Spring Garden, Ala., to Mines of Alabama & Georgia Iron Co.	4.40
Wilton, Ala., to Valley Creek Junction, Ala.	37.28
Gurnee Junction, Ala., to Blocton, Ala.	14.30
Seymour, Ala., to end of track, Piper Spur	3.91
Badham Spur, Ala.	5.60
Galloway Coal Co. Spur near Aden, Ala.	.59
Ardela, Ala., to Hansell, Ala.	2.70
Marion Junction, Ala., to Akron, Ala.	53.00
Louisville, Ky., to Cincinnati Southern Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.83
[fol. 114] New Albany, Ind., to Illinois State Line (So. Ry. in Ind.)	118.28
Jasper, Ind., to French Lick, Ind. (So. Ry. in Ind.)	24.03
Jasper, Ind., to Evansville, Ind. (So. Ry. in Ind.)	54.68

	Miles
Lincoln City, Ind., to Cannelton, Ind. (So. Ry. in Ind.)	22.72
Rockport Junction, Ind., to Rockport, Ind. (So. Ry. in Ind.)	16.15
	4,146.67
East St. Louis, Ill., to Indiana State Line	146.71
Belleville Junction, Ill., to Belleville, Ill.	1.14
Venice & Carondelet Belt at East St. Louis, Ill.	6.86
Connection with Chicago & Alton Ry., to North Incline Terminal, East St. Louis, Ill.	2.40
Okolona, Miss., to Calhoun City, Miss.	37.82
Total Mileage Owned	4,341.60
Total Owned Mileage	4,261.85
Total Owned Mileage leased to other Companies	70.75

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Miles of Road

Brought forward	6,584.30
Trackage Rights:	
Atlanta terminal Company—Entrance to Union Passenger Station, Atlanta, Ga.	.50
Baltimore & Ohio Railroad—Entrance to Passenger Station, Harrisonburg, Va.	.50
Phila., Balto. & Washington R. R.—Washington, D. C. to South end Potomac Bridge, Va.	2.14
Washington Terminal Company—Entrance to Union Passenger Station, Washington, D. C.	1.26
Washington Southern Railway—South end Potomac Bridge, Va. to Seminary Junction, Va.	5.70
Seaboard Air Line Railway — Rocketts, Va. to Main St. Station, Richmond, Va.	.50
Chesapeake & Ohio Railway—Park Siding, Va. to Main St. Station, Richmond, Va.	2.00

		Miles
Central of Georgia Railway:		
Chattanooga, Tenn.	.60	
Central Junction, Ga. to West Broad Street, Savannah, Ga.	3.37	
Fort Valley, Ga.	.10	
		4.07
[fol. 115] Augusta and Summerville Railroad—entrance to Union Passenger Station, Augusta, Ga.		.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga.		.25
Western and Atlantic Railroad—W. & A. Crossing, Ga. to Dalton, Ga.		.20
Alabama Great Southern Railroad:		
Entrance to Station, Attalla, Ala.	3.44	
Woodlawn, Ala. to Birmingham, Ala.	2.11	
York, Ala. to Meridian, Miss.	27.16	
Central Passenger Station to Louisa St., Chattanooga, Tenn.	.40	
Near Wauhatchie, Tenn. to Memphis-Chattanooga Junction, Tenn.	2.15	
Connection Memphis-Chattanooga Ry. to connection Central of Georgia Ry. near Chattanooga, Tenn.	.77	
		36.03
Louisville & Nashville Railroad:		
Cumberland Gap Tenn. to Middlesboro, Ky. (So. Ry. in Ky.)	4.41	
Stony Fork and Hignite Branch, Ky.	10.41	
Middlesborough Belt and Bennets Fork Branch, Ky.	9.81	
Halsey Branch, north of Jellico Yard, to Hyde, Tenn.	9.22	
Appalachia, Va. to Norton, Va.	10.00	
		43.85

		Miles
Atlantic Coast Line Railroad:		
Pinners Point, Va. to Selma, N. C.	154.38	
Hardeeville, S. C. to Central Junction, Ga.	16.70	
Four Mile Crossing, Ga. to Union Passenger Station, Brunswick, Ga.	3.10	
Central Junction, Ga. to Jacksonville Terminal property line, Jacksonville, Fla.	152.08	
Entrance to Union Passenger Station, Savannah, Ga.	.72	
Central Junction, Ga. to end of double track	.09	
Entrance to Union Passenger Station, Goldsboro, N. C.	.20	
		327.27
Northern Alabama Railway—N. A. Junction to Sheffield, Ala.		3.49
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss.		.65
[fol. 116] Nashville, Chattanooga & St. Louis Railway—Chattanooga, Tenn. to Stevenson, Ala		38.00
Jacksonville Terminal Company—Entrance to Union Station, Jacksonville, Fla.		1.47
Memphis Union Station Company—Entrance to Union Passenger Station, Memphis, Tenn.		.55
Chattanooga Station Company—Entrance to Union Passenger Station, (Chattanooga, Tenn.)		.87
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.		4.48
Terminal Railroad Association of St. Louis—St. Louis, Mo. to Broadway, East St. Louis, Ill.		3.28
Jacksonville & St. Louis Railway—Through Centralia, Ill.		1.80
Baltimore & Ohio Southwestern Railroad—New Albany, Ind.		.06
Chicago & Alton Railway—Near East St. Louis, Ill.		.70

		Miles
Evansville & Tere Haute Railroad:		
South Junction to West Junction, Princeton, Ind.	1.64	
South Junction to Passenger Station, Evansville, Ill.	.63	
		2.27
Illinois Central Railroad: Eleventh Street to Seventh Street, Union Passenger Station, Louisville, Ky.		.50
Kentucky and Indiana Terminal Railroad:		
Vincennes Street, New Albany, Ind. to Eleventh Street, Louisville, Ky.	3.00	
Louisville, Ky.	4.53	
		7.53
Cincinnati, New Orleans & Texas Pacific Railway:		
Entrance to Station, Burgin, Ky.	.23	
Cincinnati Southern Junction, Ky. to Danville, Ky.	4.88	
Chattanooga, Tenn.	2.29	
Lexington Junction, Ky. to Lexington, Ky. (So. Ry. in Ky.)	.62	
		8.02
St. Johns River Terminal—Near Grand Crossing, Fla. to Bay St. Freight Depot, Jacksonville, Fla.		5.99
Chicago, Indianapolis & Louisville Railway—French Lick, Ind. to West Baden, Ind.		1.00
Norfolk & Western Railway—Norton Va. to Toms Creek, Va.		12.08
		517.50
Total Miles of Road		7,101.80

[fol. 117] IN COURT OF APPEALS

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS, Sheriff of Woodford County, Kentucky, Appellant,

vs.

SOUTHERN RAILWAY COMPANY and JOHN BARTON PAYNE, Director General of Railroads, as Agent, under Sec. 206 of the Transportation Act of 1920, Appellees

STATEMENT OF APPEAL

The judgment appealed from was rendered on March 12, 1921, and is found on pages 63-64 of the record.

Appeal granted below. No process is necessary. Counsel for appellees, Wallace & Harriss, Versailles, Ky., and Humphrey, Crawford & Middleton, Louisville, Ky.

L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for appellant.

IN COURT OF APPEALS

EXHIBITS

"B"

(Here follow income statements marked side folio pages 117a, 117b, 117c, 117d, 117e, 117f, 117g, 117h, 117i, 117j)

INCOME ACCOUNT

YEAR ENDED JUNE 30, 1914.

	SOU.RY.CO.	SOU.RY.CO. IN KEN.	CUMB.RY. COMPANY	STATE UNIVERSITY RAILROAD	N.C.MID. R.R.	HIGH POINT RANDLEMAN ASHEBORO & SOUTHERN	YADKIN RAILROAD COMPANY	ATLANTIC AND YADKIN	ROSWELL RAILROAD COMPANY	CAROLINA AND TENNESSEE SOUTHERN	TENNESSEE AND CAROLINA SOUTHERN	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
RAILWAY OPERATING INCOME													
Rail Operations-Revenue...	66,653,760.71	1,471,729.81	30,980.00	37,743.07	445,306.06	113,468.01	184,796.84	512,699.69	11,477.52	9,204.13	17,660.58	17,025.47	27,845.35
Rail Operations-Expenses..	47,987,089.20	1,360,168.38	40,552.83	26,070.95	281,696.96	84,184.71	138,803.76	469,013.16	19,994.98	10,981.48	19,876.18	29,044.94	103,697.01
Net Revenue Rail Operatns.	18,666,671.51	111,561.43	x9,572.83	11,672.12	163,609.10	29,283.30	45,993.08	43,686.53	x8,517.46	x1,777.35	x2,215.60	x12,019.47	x75,851.66
Auxiliary Opn-Revenues....	1,217,299.51												
" " Expenses....	1,189,474.73												
Net Revenue-Auxiliary Opns	27,824.78												
Net Ry.Operating Revenue..	18,694,496.29	111,561.43	x9,572.83	11,672.12	163,609.10	29,283.30	45,993.08	43,686.53	x8,517.46	x1,777.35	x2,215.60	x12,019.47	x75,851.66
Railway Tax Accruals......	2,605,847.82	21,479.57	1,585.84	489.19	14,889.45	4,355.55	3,427.50	21,982.32	1,423.90	409.51	3,409.02		
Railway Operating Income..	16,088,648.47	90,081.86	x11,158.67	11,182.93	148,719.65	24,927.75	42,565.58	21,704.21	x9,941.36	x2,276.86	x5,624.62	x12,019.47	x75,851.66
OTHER INCOME													
Income from Lease of Road.	65,000.00								6,470.62				
Hire of Eqpmnt.-Cr.Balance								4,852.90					
Jt.Facility Rent Income...	195,769.21		15,610.91		732.23								
Misc.Rent Income.........	110,291.69	760.67		13.00	238.58	74.40	146.84	443.23	38.53				
Net Profit from Misc. Physcl. Property	26,123.51												
Sep. Operated Properties..	671.18												
Dividend Income..........	1,331,794.24												
Income from Funded Sectrs.	1,380,317.26												
Income from Unfunded Securities and Accounts...	131,722.78					62.88							
Income from Sinking and Other Reserve Funds.....	35,875.00												
Release of Premiums on Funded Debt.............	166.84												
Miscellaneous Income.....	122.25												
Total Other Income.......	3,277,853.96	760.67	15,610.91	13.00	970.81	137.28	146.84	5,296.13	6,509.15				
Gross Income............	19,366,502.43	90,842.53	4,452.24	11,195.93	149,690.46	25,065.03	42,712.42	27,000.34	x3,432.21	x2,276.86	x5,624.62	x12,019.47	x75,851.66
DEDUCTIONS FROM GROSS INCOME													
Deductions for lease of other roads..............	1,894,998.31												
Hire of Eqm't-Dr.Balance..	378,830.41	67,097.09	1,087.46	2,306.04	88,547.35	28,972.50	38,812.95		195.39	395.52	188.47		133.28
Jt.Facility Rent Deductns.	817,097.20	222,017.22	12,695.49					252.60					
Misc. Rent Deductions.....	38,276.45	413.60											
Misc.Tax Accruals.........													
Net Loss on Misc Phys Prop													
Sep. Operated Properties..	189,887.02	334.62											
Interest Deductions for Funded Debt............	10,939,596.37	139,850.00	21,920.00		48,060.00	24,120.00	36,900.00	60,000.00	6,750.00	14,800.00	35,600.00		
Interest Deductions for Unfunded Debt..........	37.93	135,251.04		10,127.26		10,483.52	52,894.21	5,407.28					
Amortization of discount on Funded Debt..........													
Transfer of Income to other Companies.........													
Miscellaneous Deductions..	13,001.76											218.42	57,955.00
Total Deductions.......	14,271,725.45	564,963.57	35,702.95	12,433.30	136,607.35	63,576.02	128,607.16	65,659.88	5,945.39	15,195.52	35,788.47	218.42	58,088.28
Net Income..............	5,094,776.98	x474,121.04	x31,250.71	x1,237.37	13,083.11	x38,510.99	x85,894.74	x38,659.54	x10,377.60	x17,472.38	x41,413.09	x12,237.89	x133,939.94

# To reflect the Railway Operating Income on the same basis as used in the Act of March 21,1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be Annual Railway Operating In-

" " Expenses....	1,189,474.73												
Net Revenue-Auxiliary Opns	27,824.78												
Net Ry.Operating Revenue..	18,694,496.29	111,561.43	x9,572.83	11,672.12	163,609.10	29,283.30	45,993.08	43,686.53	x8,517.46	x1,777.35	x2,215.60	x12,019.47	x75,861.66
Railway Tax Accruals......	2,605,847.82	21,479.57	1,585.84	489.19	14,889.45	4,355.55	3,427.50	21,982.32	1,423.90	409.51	3,409.02		
Railway Operating Income..	16,088,648.47	90,081.86	x11,158.67	11,182.93	148,719.65	24,927.75	42,565.58	21,704.21	x9,941.36	x2,276.86	x5,624.62	x12,019.47	x75,851.66
OTHER INCOME													
Income from Lease of Road.	65,000.00								6,470.62				
Hire of Eqpmnt.-Cr.Balance								4,852.90					
Jt.Facility Rent Income...	195,769.21		15,610.91		732.23								
Misc.Rent Income..........	110,291.69	760.67		13.00	238.58	74.40	146.84	443.23	38.53				
Net Profit from Misc. Physcl. Property	26,123.51												
Sep. Operated Properties..	671.18												
Dividend Income...........	1,331,794.24												
Income from Funded Sectrs.	1,380,317.26												
Income from Unfunded Securities and Accounts...	131,722.78					62.88							
Income from Sinking and Other Reserve Funds.....	35,875.00												
Release of Premiums on Funded Debt............	166.84												
Miscellaneous Income......	122.25												
Total Other Income........	3,277,853.96	760.67	15,610.91	13.00	970.81	137.28	146.84	5,296.13	6,509.15				
Gross Income............	19,366,502.43	90,842.53	4,452.24	11,195.93	149,690.46	25,065.03	42,712.42	27,000.34	x3,432.21	x2,276.86	x5,624.62	x12,019.47	x75,851.66
DEDUCTIONS FROM GROSS INCOME													
Deductions for lease of other roads..............	1,894,998.31												
Hire of Eqm't-Dr.Balance..	378,830.41	67,097.09	1,087.46	2,306.04	88,547.35	28,972.50	38,812.95		195.39	395.52	188.47		133.28
Jt.Facility Rent Deductns.	817,097.20	222,017.22	12,695.49					252.60					
Misc. Rent Deductions.....	38,276.45	413.60											
Misc.Tax Accruals.........													
Net Loss on Misc Phys Prop													
Sep. Operated Properties..	189,887.02	334.62											
Interest Deductions for Funded Debt.............	10,939,596.37	139,850.00	21,920.00		48,060.00	24,120.00	36,900.00	60,000.00	6,750.00	14,800.00	35,600.00		
Interest Deductions for Unfunded Debt...........	37.93	135,251.04		10,127.26		10,483.52	52,894.21	5,407.28					
Amortization of discount on Funded Debt..........													
Transfer of Income to other Companies.........													
Miscellaneous Deductions..	13,001.76											218.42	57,955.00
Total Deductions.......	14,271,725.45	564,963.57	35,702.95	12,433.30	136,607.35	63,576.02	128,607.16	65,659.88	6,945.39	15,195.52	35,788.47	218.42	58,088.28
Net Income...............	5,094,776.98	x474,121.04	x31,250.71	x1,237.37	13,083.11	x38,510.99	x85,894.74	x38,659.54	x10,377.60	x17,472.38	x41,413.09	x12,237.89	x133,939.94

# To reflect the Railway Operating Income on the same basis as used in the Act of March 21,1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be Annual Railway Operating Income in the computation of which debits and credits arising from the Accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income...	16,088,648.47	90,081.86	x11,158.67	11,182.93	148,719.65	24,927.75	42,565.58	21,704.21	X9,941.36	x2,276.86	x5,624.62	x12,019.47	x75,851.66
Hire of Equipment - Net...	X378,830.41	X67,097.09	x1,087.46	X2,306.04	X88,547.35	X28,972.50	X38,812.95	4,852.90	X195.39	X395.52	x188.47		X133.28
Jt.Facility Rent - Net....	X621,327.99	X222,017.22	2,915.42		732.23			X252.60					
Net Railway Op. Income....	15,087,490.07	X199,032.45	X9,330.71	8,876.89	60,904.53	X4,044.75	3,752.63	26,304.51	X10,136.75	X2,672.38	X5,813.09	X12,019.47	X75,984.94

NOTE:---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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INCOME ACCOUNT

YEAR ENDED JUNE 30, 1914

	A.G.S.	A. & C.MTN	BLUE RIDGE	CUMB.R.R.	D.&W.	M. & O.	G. S. & F.	HARTWELL	NOR.ALA.	TAL.FALLS	V. & S. W.
RAILWAY OPERATING INCOME											
Rail Operations-Revenue..........	5,385,307.45	7,600.48	181,668.77	54,518.00	343,044.37	12,975,430.72	2,596,548.56	29,555.75	582,370.48	149,153.92	1,939,104.36
Rail Operatings-Expenses......	4,227,463.71	4,174.21	145,377.03	42,962.97	207,937.14	10,075,827.48	2,116,962.06	21,684.68	410,084.53	117,910.90	1,370,867.64
Net Revenue Rail Operation....	1,157,843.74	3,426.27	36,291.74	11,555.03	135,107.23	2,899,603.24	484,586.50	7,871.07	172,285.95	31,243.02	
Auxiliary Operation-Revenues..											
" " Expenses..											
Net Revenue-Auxiliary Opns....	X6,607.18					X19,165.29	X1,348.48				
Net Ry.Operating Revenue......	1,151,236.56	3,426.27	36,291.74	11,555.03		2,880,437.95	483,238.02	7,871.07	172,285.95	31,243.02	568,236.72
Railway Tax Accruals.........	189.856.61	289.89	6,646.13	517.80	13,364.02	416,518.98	136,219.70	639,02	31,907.20	5,120.74	77,409.98
#Railway Operating Income.....	961,379.95	3,136.38	29,645.61	11,037.23	121,743.21	2,463,918.97	347,018.32	7,232.05	140,378.75	26,122.28	490,826.74
OTHER INCOME											
Income from Lease of Road.....											
Hire of Eqpmnt-Cr.Balance.....	186,203.54						134,483.53				189,044.91
Jt.Facility Rent Income.......		150.00	265.32			40,314.71	13,013.37		49,359.77		4,449.78
Misc.Rent Income..............	33,406.31		775.37	111.03		10,714.15	3.189.70	136.60	91.57	66.00	1,207.63
Net Profit from Misc.Physcl. Property..................							5,165.71		177.16		924.99
Separately Operated Properties.											
Dividend Income................											
Income from Funded Securities..	157,892.06					34,462.31	750.00				
Income from Unfunded Securities and Accounts..............					525.01		4,857.03		103.01		6,450.56
Income from Sinking and Other Reserve Funds............											
Release of Premium on Funded Debt..................											
Miscellaneous Income..........						22,452.26					42.35
Total Other Income..........	377,501.91	150.00	1,040.69	111.03	525.01	107,943.73	161,459.34	136.60	49,731.51	66.00	202,120.22
Gross Income.............	1,338,881.86	3,286,38	30,686.30	11,148.26	122,268.22	2,571,862.70	508.477.66	7,368.65	149,110.28	26,188.28	692,946.96
DEDUCTIONS FROM GROSS INCOME											
DEductions for lease of ether roads.................			4,000.00			48,106.99					10.000.00
Hire of Eqpmt.-Dr.Balance......			13,150.37	10.727.67	7,991.87	203,182.15		1,474.61	124,929.95	10,212.35	
Jt.Facility Rent Deductions...			240.00		1,568,75	566,560.06	47,271.20				34,800.61
Misc. Rent Deductions.........	100,649.99			65.26	286.20		20.70		395.00	60.00	
Misc.Tax Accruals..............											
Net Loss on Misc. Phys.Properties..											
Separately Operated Properties...											
Interest Deductions for Funded Debt................	351,332.55		5,000.00	16,911.96	53,489.33	1,494,068.34	303,310.00	1,000.00	83,500.00	76,076.00	
Interest Deductions for Unfunded Debt...............					24,915.46		7,213.25	2,26	13,844.16		
Amortization of discount on Funded Debt..............											2,234.64
Transfer of Income to other Companies..................											
Miscellaneous Deductions......	129,712,47	28,91				174,836,36	409.65				1,043.75
Total Deductions...........	581.695.01	28.91	22,390.37	27,704.89	88,251.61	2,486,753.90	358,224.80	2,476,87	221,669.11	86,348.35	423,548.16
Net Income.............	757,186.85	3,257.47	8,295.93	X16,556.63	34,016.61	85,108.80	150,252.86	4,981.78	X31,558.85	X60,160.07	269,398.80

# To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken

Net Ry.Operating Revenue	1,151,236.56	3,426.27	36,291.74	11,555.03		2,880,437.95	483,238.02	7,871.07	172,285.95	31,243.02	568,236.72
Railway Tax Accruals	189.856.61	289.89	6,646.13	517.80	13,364.02	416,518.98	136,219.70	639,02	31,907.20	5,120.74	77,409.98
#Railway Operating Income	961,379.95	3,136.38	29,645.61	11,037.23	121,743.21	2,463,918.97	347,018.32	7,232.05	140,378.75	26,122.28	490,826.74
OTHER INCOME											
Income from Lease of Road											
Hire of Eqpmnt-Cr.Balance	186,203.54						134,483.53				189,044.91
Jt.Facility Rent Income		150.00	265.32			40,314.71	13,013.37		49,359.77		4,449.78
Misc.Rent Income	33,406.31		775.37	111.03		10,714.15	3.189.70	136.60	91.57	66.00	1,207.63
Net Profit from Misc.Physcl. Property							5,165.71		177.16		924.99
Separately Operated Properties											
Dividend Income											
Income from Funded Securities	157,892.06					34,462.31	750.00				
Income from Unfunded Securities and Accounts					525.01		4,857.03		103.01		6,450.56
Income from Sinking and Other Reserve Funds											
Release of Premium on Funded Debt											
Miscellaneous Income						22,452.26					42.35
Total Other Income	377,501.91	150.00	1,040.69	111.03	525.01	107,943.73	161,459.34	136.60	49,731.51	66.00	202,120.22
Gross Income	1,338,881.86	3,286,38	30,686.30	11,148.26	122,268.22	2,571,862.70	508.477.66	7,368.65	149,110.26	26,188.28	692,946.96
DEDUCTIONS FROM GROSS INCOME											
DEductions for lease of other roads			4,000.00			48,106.99					10.000.00
Hire of Eqpmt.-Dr.Balace			13,150.37	10.727.67	7,991.87	203,182.15		1,474.61	124,929.95	10,212.35	
Jt.Facility Rent Deductions			240.00		1,568,75	566,560.06	47,271.20				34,800.61
Misc. Rent Deductions	100,649.99			65.26	286.20		20.70		395.00	60.00	
Misc.Tax Accruals											
Net Loss on Misc. Phys.Properties											
Seperately Operated Properties											
Interest Deductions for Funded Debt	351,332.55		5,000.00	16,911.96	53,489.33	1,494,068.34	303,310.00	1,000.00	83,500.00	76,076.00	
Interest Deductions for Unfunded Debt					24,915.46		7,213.25	2.26	13,844.16		
Amortization of discount on Funded Debt											2,234.64
Transfer of Income to other Companies											
Miscellaneous Deductions	129,712.47	28.91				174,836.36	409.65				1,043.75
Total Deductions	581.695.01	28.91	22,390.37	27,704.89	88,251.61	2,486,753.90	358,224.80	2,476.87	221,669.11	86,348.35	423,548.16
Net Income	757,186.85	3,257.47	8,295.93	x16,556.63	34,016.61	85,108.80	150,252.86	4,981.78	x31,558.85	x60,160.07	269,398.80

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the Annual Railway Operating Income in the computation of which debts and credits arising from the Accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income	961,379.95	3,136.38	29,645.61	11,037.23	121,743.21	2,463,918.97	347,018.32	7,232.05	140,378.75	26,122.28	490,826.74
Hire of Equipment-Net	186,203.54		x13,150.37	x10,727.67	x7,991.87	x203,182.15	134,483.53	x1,474.61	x124,929.95	x10,212.35	189,044.91
Joint Facility Rent-Net		150.00	25.32		x1,568.75	x526,245.35	x34,257.83		49,359.77		x30,350.83
Net Railway Operating Income	1,147,583.49	3,286.38	16,520.56	309.56	112,182.59	1,734,491.47	447,244.02	5,757.44	64,808.57	15,909.93	649,520.82

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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INCOME ACCOUNT

YEAR ENDED JUNE 30, 1915.

	SOU.RY.CO.	SOU.RY.CO. IN KEN.	CUMB.RY.CO.	STATE UNIVERSITY RAILROAD	NORTH CAROLINA MIDLAND	H P R A & S	YADKIN	ATLANTIC AND YADKIN	ROSWELL	TENN.AND CAR. SOU.	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
OPERATING INCOME												
Railway Operating Revenues..	59,789,310.60	1,237,126.10	31,384.75	32,820.49	393,075.32	84,884.91	139,078.99	436,445.74	15,443.93	12,261.38	10,341.83	17,335.49
Railway Operating Expenses..	43,777,958.85	1,215,545.38	42,441.60	21,615.94	269,921.61	83,407.30	119,384.72	495,920.51	22,102.48	26,123.85	27,472.11	72,816.24
Net Revenue from Ry.Oprn....	16,011,351.75	21,580.72	x11,056.85	11,204.55	123,153.71	1,477.61	19,694.27	x59,474.77	x6,658.55	x13,682.47	x17,130.28	x55,480.76
Railway Tax Accruals........	2,512,303.78	28,241.34	1,852.45	464.75	13,917.69	4,300.60	3,315.88	21,539.26	1,362.91	2,998.63		5,530.98
Uncollectible Ry.Revenues...	27,969.60	316.06	4.99	8.28	201.04	51.76	19.96	338.16	2.69	1.35		2.20
# Railway Operating Income...	13,471,078.37	x6,976.68	x12,914.29	10,731.52	109,034.98	x2,874.75	16,358.43	x81,352.19	x8,024.15	x16,862.45	x17,130.28	x61,013.93
Revenues from Misc.Opns.....												
Expenses of Misc. Opns......												
Net.Rev.from Misc.Opns....												
Taxes on Misc.Oprn.Prop.....												
Misc.Operating Income.......												
Total Operating Income....	13,471,078.37	x6,976.68	x12,914.29	10,731.52	109,034.98	x2,874.75	16,358.43	x81,352.19	x8,024.15	x16,862.45	x17,130.28	x61,013.93
NON OPERATING INCOME												
Hire of Frt.Cars-Cr.Bal.....												
Rent from Locomotives.......	87,167.41											
Rent from Pass.Train Cars...	211,352.92											
Rent from floating Equpm't..	1,247.50											
Rent from Wk.Equipment......	21,334.22											
Jt.Facility Rent Income.....	268,651.47		15,151.82		673.95							
Income from Lease of Road...	65,880.00											
Misc. Rent Income...........	124,440.58	1,337.48		10.00	440.60	349.00	139.93	485.29	45.00			
Misc. Non-Operating Physical Property................	23,280.85											
Separately Operated Properties-Profit...............	32.92											
Dividend Income.............	1,080,243.89											
Income from Funded Securits.	1,071,170.78											
Income from Unfunded S&A....	505,134.62											
Income from Sinking and Other Reserve Funds.......	37,855.00											
Release of Premiums on Funded Debt................												
Contributions from other Companies.................												
Miscellaneous Income........	330.56											
Total Non-Operating Income.	3,498,122.72	1,337.48	15,151.82	10.00	1,114.55	349.00	139.93	485.29	45.00			
Gross Income............	16,969,201.09	x5,639.20	2,237.53	10,741.52	110,149.53	x2,525.75	16,498.36	x80,866.90	x7,979.15	x16,862.45	x17,130.28	x61,013.93
DEDUCTIONS FROM GROSS INCOME												
Hire of Frt.Cars-Dr.Bal.....	684,667.37	39,592.65	17,896.00	8,834.15	80,682.00	30,490.05	39,078.10	7,246.20	9,671.55	3,120.00	5,837.80	2,589.75
Rent for Locomotives........	29,141.00											
Rent for Pass.Train Cars....	183,438.31											
Rent for Floating Eqpm't....												
Rent for Work Equipment.....	16,433.18											
Jt.Facility Rents...........	899,080.34	135,055.63	12,910.12					96.94				
Rent for Leased Roads.......	1,585,625.75											
Miscellaneous Rents.........	40,837.36	728.72										
Miscellaneous Tax Accruals..												
Separate Operated Prop-Loss.	183,020.90	620.86										
Interest on Funded Debt.....	10,925,806.19	139,850.00	21,920.00		48,060.00	24,120.00	36,900.00	60,000.00	6,750.00	35,600.00		57,955.00
Interest on Unfunded Debt...	2,294.52					12,438.38	56,194.19					
Amortization of discount on Funded Debt...............												
Maintenance of Investment Organization..............	24,283.66											
Income trans. to Other Companies.................												
Misc. Income Charges........	25,728.21											8,080.00
Total Deductions from G.L.	14,600,356.79	315,847.86	52,726.12	8,834.15	128,742.00	67,048.43	132,172.29	67,343.14	16,421.55	38,720.00	5,837.80	68,624.75
Net Income............	2,368,844.30	X321,487.06	x50,488.59	1,907.37	x18,592.47	x69,574.18	115,673.93	x148,210.04	x24,400.70	X55,582.45	x22,968.08	x129,638.68

# To reflect the Railway Operating Income on the same basis as used in the Act of March 21,1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the Annual Railway Operating

Net.Rev.from Misc.Opns....												
Taxes on Misc,Oprn.Prop.....												
Misc.Operating Income.......												
Total Operating Income....	13,471,078.37	x6,976.68	x12,914.29	10,731.52	109,034.98	x2,874.75	16,358.43	x81,352.19	x8,024.15	x16,862.45	x17,130.28	x61,013.93

NON OPERATING INCOME

Hire of Frt.Cars-Cr.Bal......												
Rent from Locomotives.......	87,167.41											
Rent from Pass.Train Cars...	211,352.92											
Rent from floating Equpm't..	1,247.50											
Rent from Wk.Equipment......	21,334.22											
Jt.Facility Rent Income.....	265,651.47		15,151.82		673.95							
Income from Lease of Road...	65,880.00											
Misc. Rent Income...........	124,440.58	1,337.48		10.00	440.60	349.00	139.93	485.29	45.00			
Misc. Non-Operating Physical Property..................	23,280.85											
Separately Operated Proper. ties-Profit...............	32.92											
Dividend Income.............	1,080,243.89											
Income from Funded Securits.	1,071,170.78											
Income from Unfunded S&A....	505,134.62											
Income from Sinking and Other Reserve Funds.......	37,855.00											
Release of Premiums on Funded Debt...............												
Contributions from other Companies................												
Miscellaneous Income........	330.56											
Total Non-Operating Income.	3,498,122.72	1,337.48	15,151.82	10.00	1,114.55	349.00	139.93	485.29	45.00			
Gross Income.............	16,969,201.09	x5,639.20	2,237.53	10,741.52	110,149.53	x2,525.75	16,498.36	x80,866.90	x7,979.15	x16,862.45	x17,130.28	x61,013.93

DEDUCTIONS FROM GROSS INCOME

Hire of Frt.Cars-Dr.Bal.....	684,667.37	39,592.65	17,896.00	8,834.15	80,682.00	30,490.05	39,078.10	7,246.20	9,671.55	3,120.00	5,837.80	2,589.75
Rent for Locomotives........	29,141.00											
Rent for Pass.Train Cars....	183,438.31											
Rent for Floating Eqpm't....												
Rent for Work Equipment.....	16,433.18											
Jt.Facility Rents...........	899,080.34	135,055.63	12,910.12					96.94				
Rent for Leased Roads.......	1,585,625.75											
Miscellaneous Rents.........	40,837.36	728.72										
Miscellaneous Tax Accruals..												
Separate Operated Prop-Loss.	183,020.90	620.86										
Interest on Funded Debt.....	10,925,806.19	139,850.00	21,920.00		48,060.00	24,120.00	36,900.00	60,000.00	6,750.00	35,600.00		57,955.00
Interest on Unfunded Debt...	2,294.52					12,438.38	56,194.19					
Amortization of discount on Funded Debt...............												
Maintenance of Investment Organization..............	24,283.66											
Income trans. to Other Companies.................												
Misc. Income Charges........	25,728.21											8,080.00
Total Deductions from G.L.	14,600,356.79	315,847.86	52,726.12	8,834.15	128,742.00	67,048.43	132,172.29	67,343.14	16,421.55	38,720.00	5,837.80	68,624.75
Net Income............	2,368,844.30	x321,487.06	x50,488.59	1,907.37	x18,592.47	x69,574.18	115,673.93	x148,210.04	x24,400.70	x55,582.45	x22,968.08	x129,638.68

# To reflect the Railway Operating Income on the same basis as used in the Act of March 21,1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the Annual Railway Operating Income in the computation of which debits and credits arising from the Accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income....	13,471,078.37	x6,976.68	x12,914.29	10,731.52	109,034.98	x2,874.75	16,358.43	x81,352.19	x8,024.15	x16,862.45	x17,130.28	x61,013.93
Hire of Equipment-Net.......	x592,577.81	x39,592.65	x17,896.00	x8,834.15	x80,682.00	x30,490.05	x39,078.10	x7,246.20	x9,671.55	x3,120.00	x5,837.80	x2,589.75
Joint Facility Rent-Net.....	x630,428.87	x135,055.63	2,241.70		673.95			x 96.94				
Net Railway Operating Income	12,248,071.69	x181,624.96	x28,568.59	1,897.37	29,026.93	x32,364.80	x22,719.67	x88,695.33	x17,695.70	x19,962.45	x22,968.08	x63,603.68

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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INCOME ACCOUNT

YEAR ENDED JUNE 30, 1915.

	A. G. S.	A.& C.MTN.	BLUE RIDGE	CUMB RR	C & T S	D. & W.	G S & F	HARTWELL	M. & O.	NOR. ALA.	TALL FALLS	V S & W
OPERATING INCOME												
Railway Operating Revenues....	4,776,629.89	5,715.35	176,209.38	56,156.62	18,711.95	344,212.68	2,215,773.23	24,358.55	10,982,149.06	530,068.81	117,560.72	1,799,300.80
Railway Operating Expenses....	3,653,733.63	6,400.07	135,651.66	45,062.00	11,613.94	209,603.81	1,843,662.29	16,942.01	7,933,656.29	353,338.32	133,016.47	1,338,705.51
Net Revenue from Ry.Oprn......	1,122,896.26	X684.72	40,557.72	11,094.62	7,098,01	134,608.87	372,110.94	7,416.54	3,048,492.77	176,730.49	4,544.25	460,595.29
Railway Tax Accruals..........	177,929.98	280.65	6,063.62	491.89	505.13	16,433.34	116,180.43	575.05	385,591.08	32,148.34	5,349.57	80,814.91
Uncollectible Ry.Revenues.....	703.46		63.45		.08		2,525.30		2,139.67	233.62	8.53	11.46
# Railway Operating Income.....	944,262.82	x965.37	34,430.65	10,602.73	6,592.80	118,175.53	253,405.21	6,841.49	2,660,762.02	144,348.53	x813.85	379,768.92
Revenues from Misc.Opns........												
Expenses of Misc.Operations...												
Net Rev.from Misc.Opns......												
Taxes on Misc.Oprn.Prop.......												
Misc.Operating Income.........												
Total Operating Income......	944,262.82	x965.37	34,430.65	10,602.73		118,175.53	253,405.21	6,841.49	2,660,762.02	144,348.53	x813.85	379,768.92
NON OPERATING INCOME												
Jt.Facility Rent Income.......		150.00	200.55				10,666.70		39,976.57	53,392.53		3,530.02
Hire of Frt.Cars-Cr.Bal.......	104,107.83						79,467.00					172,538.45
Rent from Locomotives.........												
Rent from Pass.Train Cars.....												
Rent from floating Eqpm't.....												
Rent from Wk.Eqpment..........												
Income from Lease of Road.....												
Misc.Rent Income..............	22,661.21		816.35	15.33	5.00		3,696.84	65.00	10,563.98	94.20	81.00	1,434.92
Misc. Non-Operating Physical Property....................							1,042.58			170.20		1,045.37
Separately Operated Properties-Profit............												
Dividend Income...............							3,114.00					
Income from Funded Securities.	112,698.75						750.00		1[illegible]45.00			
Income from Unfunded S.& A....			2,063.84			598.82	9.421.09			310.00	10.86	1,074.22
Income from Sinking and Other Reserve Funds..........												
Release of Premiums on Funded Debt....................												
Contributions from other Companies...................												
Miscellaneous Income									14,660.06		1.50	
Total Non-Operating Income....	239,467.79	150.00	3,080.74	15.33	5.00	598.82	108,158.21	65.00	66,945.61	53,966.93	93.36	179,622.98
Gross Income.............	1,183,730.61	X815.37	37,511.39	10,618.06	6,597.80	118,774.35	361,563.42	6,906.49	2,727,707.63	198,315.46	X720.49	559,391.90
DEDUCTIONS FROM GROSS INCOME												
Hire of Frt.Cars-Dr.Bal.......			10,057.43	12,271.79	18,072.14	7,318.75		740.10	129,917.25	92,033.51	2,920.07	
Jt.Facility Rents.............			240.00			1,568.75	48,402.47		534,244.68	2,809.19		36,864.38
Rent for Locomotives..........		4,456.00	480.85							31,148.07	352.00	
Rent for Pass.Train Cars......			1,043.78			115.39		29.16		4,582.36	422.90	
Rent for Floating Eqpm't......												
Rent for Work Equipment.......										703.18		
Rent for Leased Roads.........			4,000.00									10,000.00
Miscellaneous Rents...........	100,676.60			62.54		286.20				395.00	60.00	
Miscellaneous Tax Accruals....							599.00					
Separate Operated Prop-Loss...												
Interest on Funded Debt.......	340,525.95	18.87	5,689.58	16,911.96	14,800.00	91,581.69	299,125.00	1,000.00	1,531.098.41	96,344.16	76,643.33	403,920.02
Interest on Unfunded Debt.....							7,580.00					
Amortization of discount on Funded Debt..................												
Maintenance of Investment Organization.................												
Income transferred to Other Companies..................												
Miscellaneous Income Charges..	116,353.81						836.53		203,779.34			1,977.18
Total Deductions from Gross Income................	557,556.36	4,474.87	21,511.64	29,246.29	32,872.14	100,870.78	356,543.48	1,769.26	2,399.039.68	228,015.47	80,398.30	452,761.58
Net Income.............	626,174.25	x5,290.24	15,999.75	X18,628.23	x26,274.34	17,903.57	5,019.94	5,137.23	328,667.95	x29,700.01	x81,118.79	106,630.32

To reflect the Railway Operating Income on the same basis as used in the Act of March 21,1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the Annual Railway Operating Income in the computation of

isc.Oprn.Prop..........												
isc.Operating Income.........												
Total Operating Income......	944,262.82	x965.37	34,430.65	10,602.73		118,175.53	253,405.21	6,841.49	2,660,762.02	144,348.53	x813.85	379,768.92
ON OPERATING INCOME												
Jt.Facility Rent Income........		150.00	200.55				10,666.70		39,976.57	53,392.53		3,530.02
Hire of Frt.Cars-Cr.Bal........	104,107.83						79,467.00					172,538.45
Rent from Locomotives..........												
Rent from Pass.Train Cars.....												
Rent from floating Eqpm't.....												
Rent from Wk.Eqpment...........												
Income from Lease of Road.....												
Misc.Rent Income...............	22,661.21		816.35	15.33	5.00		3,696.84	65.00	10,563.98	94.20	81.00	1,434.92
Misc. Non-Operating Physical Property......................							1,042.58			170.20		1,045.37
Separately Operated Properties-Profit.............												
Dividend Income................							3,114.00					
Income from Funded Securities.	112,698.75						750.00		1,745.00			
Income from Unfunded S.& A....			2,063.84			598.82	9.421.09			310.00	10.86	1,074.22
Income from Sinking and Other Reserve Funds...........												
elease of Premiums on Funded Debt.........................												
ontributions from other Companies......................												
iscellaneous Income									14,660.06		1.50	
otal Non-Operating Income....	239,467.79	150.00	3,080.74	15.33	5.00	598.82	108,158.21	65.00	66,945.61	53,966.93	93.36	179,622.98
Gross Income..............	1,183,730.61	x815.37	37,511.39	10,618.06	6,597.80	118,774.35	361,563.42	6,906.49	2,727,707.63	198,315.46	x720.49	559,391.90
DUCTIONS FROM GROSS INCOME												
ire of Frt.Cars-Dr.Bal.......			10,057.43	12,271.79	18,072.14	7,318.75		740.10	129,917.25	92,033.51	2,920.07	
t.Facility Rents..............			240.00			1,568.75	48,402.47		534,244.68	2,809.19		36,864.38
ent for Locomotives...........		4,456.00	480.85							31,148.07	352.00	
ent for Pass.Train Cars......			1,043.78			115.39		29.16		4,582.36	422.90	
ent for Floating Eqpm't......												
ent for Work Equipment.......										703.18		
ent for Leased Roads..........			4,000.00									10,000.00
iscellaneous Rents............	100,676.60			62.54		286.20				395.00	60.00	
iscellaneous Tax Accruals....							599.00					
parate Operated Prop-Loss...												
nterest on Funded Debt.......	340,525.95	18.87	5,689.58	16,911.96	14,800.00	91,581.69	299,125.00	1,000.00	1,531.098.41	96,344.16	76,643.33	403,920.02
nterest on Unfunded Debt.....							7,580.00					
ortization of discount on unded Debt.................												
intenance of Investment rganization.................												
come transferred to Other ompanies....................												
iscellaneous Income Charges..	116,353.81						836.53		203,779.34			1,977.18
otal Deductions from Gross Income................	557,556.36	4,474.87	21,511.64	29,246.29	32,872.14	100,870.78	356,543.48	1,769.26	2,399,039.68	228,015.47	80,398.30	452,761.58
Net Income.............	626,174.25	x5,290.24	15,999.75	x18,628.23	x26,274.34	17,903.57	5,019.94	5,137.23	328,667.95	x29,700.01	x81,118.79	106,630.32

o reflect the Railway Oper-
ing Income on the same basis
used in the Act of March
,1918 whereby the railroads
were taken under Federal Con-
trol; such Act providing the
basis for compensation to be
the Annual Railway Operating
Income in the computation of
which debits and credits aris-
ing from the Accounts "Equip-
ment Rents" and "Joint Facil-
ity Rents" shall be included,
we have the following:

Railway Operating Income	944,262.82	x965.37	34,430.65	10,602.73	6,592.80	118,175.53	253,405.21	6,841.49	2,660,762.02	144,348.53	x813.85	379,768.92
Hire of Equipment-Net.........	104,107.83	x4,456.00	x11,582.06	x12,271.79	x18,072.14	x7,434.14	79,467.00	x769.26	x129,917.25	x128,46[illegible].12	x3,694.97	172,538.45
Joint Facility Rent-Net.......		150.00	x39.45			x1,568.75	x37,735.77		x494,268.11	50,583.34		x33,334.36
Net Railway Operating Income..	1,048,370.65	x5,271.37	22,809.14	x1,669.06	x11,479.34	109,172.64	295,136.44	6,072.23	2,036,576.66	66,464.75	x4;508.82	518,973.01

OTE:----
The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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INCOME ACCOUNT

YEAR ENDED JUNE 30, 1916.

	SOU.RY.CO.	SOU.RY.CO. IN KEN.	CUMB.RY. CO.	STATE UNIVERSITY RAILROAD	HPRA&S	YADKIN	ATLANTIC AND YADKIN	ROSWELL R.R.Co.	TENN. AND CAR.SOU.	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
OPERATING INCOME											
Railway Operating Revenue...	67,659.037.31	1,420,440.99	31,974.23	43,397.00	85,047.42	233,570.98	435,149.55	12,362.47	33,177.87	11,358.49	32,149.93
Railway Operating Expenses..	43,900,949.46	1,239,015.72	35,244.19	21,057.02	86,960.47	124,612.63	438,300.37	19,852.48	69,406.94	30,027.49	75,689.35
Net Rev. from Ry. Operations..	23,758,087.85	181,434.27	x3,269.96	22,339.98	x1,913.05	108,958.35	x3,150.82	x7,490.01	x36,229.07	x18,669.00	x43,539.42
Railway Tax Accruals........	2,834,076.39	31,402.59	2,422.16	546.57	5,315.45	4,118.97	27,277.08	1,554.96	3,856.44		5,856.04
Uncollectible Ry. Revenues...	34,982.02	825.73	10.54	17.25	36.57	89.93	137.87	7.84	7.19		12.44
# Railway Operating Income..	20,889,029.44	149,205.95	x5,702.66	21,776.16	x7,265.07	104,749.45	x30,565.77	x9,052.81	x40,092.70	x18,669.00	x49,407.90
NON OPERATING INCOME											
Hire of Frt. Cars-Cr. Balance..											
Rent for Locomotives........	125,516.83	91,250.00									
Rent from Pass. Train Cars....	178,166.33	41,975.00									
Rent from Floating Equipment.	798.00										
Rent from Work Equipment.....	48,907.80										
Jt. Facility Rent Income......	281,384.37		7,985.77		1,297.10		27.83				
Income from Lease of Road	67,338.24										
Misc. Rent Income............	136,225.82	1,205.00		5.00	111.82	194.26	761.77	114.24		20.50	
Misc. Non-Operating Phys. Prop..	24,077.44	x139.60									
Separately Operated Properties - Profit.............	1,326.09										
Dividend Income..............	1,271,256.09										
Income from Funded Securities	1,105,959.53										
Income from unfunded S&A.......	480,129.88										
Income from Sinking and Other Reserve Funds...........	36,826.87										
Rebase of Premiums on Funded Debt..................											
Contributions from Other Cos...											
Miscellaneous Income..........	336.94										
Total Non-Operating Income.	3,758,248.23	134,290.40	7,985.77	5.00	1,408.92	194.26	808.20	114.24		20.50	
Gross Income..........	24,647,277.67	283,496.35	2,283.11	21,781.16	x5,856.15	104,943.71	x29,757.57	x8,938.57	x40,092.70	x18,648.50	x49,407.90
DEDUCTIONS FROM GROSS INCOME											
Hire of Frt. Cars-Dr. Balance..	666,585.88	27,567.90	25,000.90	9,528.50	32,498.60	47,909.60	9,347.85	10,616.45	9,261.00	10,939.70	2,348.55
Rent for Locomotives.........		112,890.00									11,970.00
Rent for Pass. Train Cars....	158,123.84	18,010.00									3,640.00
Rent for Work Equipment......	9,328.78										
Jt. Facility Rents............	917,480.54	136,422.53					337.50				
Rent for Leased Roads........	1,814,724.21										
Miscellaneous Rents..........	40,663.98	852.64									
Separately Operated Properties - Loss..................	190,643.94										
Miscellaneous Tax Accruals...											
Interest on Funded Debt.....	10,865,637.50	139,850.00	21,920.00		36,558.38	93,094.19	60,000.00	6,750.00	54,160.00		47,080.00
Interest on Unfunded Debt...	115,206.92										
Amortization of Discount on Funded Debt...............											
Maintenance of Invest. Organz...	11,242.72										
Income tranf. to Other Cos...											
Misc. Income Charges.........	25,523.43										
Total Deductions from G In.	14,815,561.74	435,593.07	46,920.90	9,528.50	69,056.98	141,003.79	69,685.35	17,366.45	63,421.00	10,939.70	65,038.55
Net Income............	9,831,715.93	x152,096.72	x44,637.79	2,252.66	x74,913.13	x36,060.08	x99,442.92	x26,305.02	x103,513.70	x29,588.20	x114,446.45

# To reflect Railway Operating Income on the same basis as used in the Act of March 21, 1918, whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to

Operating Income..	20,889,029.44	149,205.95	x5,702.66	21,776.16	x7,265.07	104,749.45	x30,565.77	x9,052.81	x40,092.70	x18,669.00	x49,407.90

NON OPERATING INCOME

Hire of Frt.Cars-Cr.Balance..											
Rent for Locomotives..........	125,516.83	91,250.00									
Rent from Pass.Train Cars....	178,166.33	41,975.00									
Rent from Floating Equipment.	796.00										
Rent from Work Equipment.....	48,907.80										
Jt.Facility Rent Income......	281,384.37		7,985.77		1,297.10		27.83				
Income from Lease of Road.	67,338.24										
Misc.Rent Income.............	136,225.82	1,205.00		5.00	111.82	194.26	761.77	114.24		20.50	
Misc.Non-Operating Phys Prop..	24,077.44	x139.60									
Separately Operated Properties - Profit.............	1,328.09										
Dividend Income..............	1,271,256.09										
Income from Funded Securities	1,105,959.53										
Income from unfunded S&A.......	480,129.88										
Income from Sinking and Other Reserve Funds...........	36,826.87										
Release of Premiums on Funded Debt...................											
Contributions from Other Cos...											
Miscellaneous Income#..........	336.94										
Total Non-Operating Income.	3,758,248.23	134,290.40	7,985.77	5.00	1,408.92	194.26	808.20	114.24		20.50	
Gross Income..........	24,647,277.67	283,496.35	2,283.11	21,781.16	x5,856.15	104,943.71	x29,757.57	x8,938.57	x40,092.70	x18,648.50	x49,407.90

DEDUCTIONS FROM GROSS INCOME

Hire of Frt.Cars-Dr.Balance..	666,585.88	27,567.90	25,000.90	9,528.50	32,498.60	47,909.60	9,347.85	10,616.45	9,261.00	10,939.70	2,348.55
Rent for Locomotives.........		112,890.00									11,970.00
Rent for Pass. Train Cars....	158,123.84	18,010.00									3,640.00
Rent for Work Equipment......	9,328.78										
Jt.Facility Rents............	917,480.54	136,422.53					337.50				
Rent for Leased Roads........	1,814,724.21										
Miscellaneous Rents..........	40,663.98	852.64									
Separately Operated Properties - Loss.................	190,643.94										
Miscellaneous Tax Accruals...											
Interest on Funded Debt.....	10,865,637.50	139,850.00	21,920.00		36,558.38	93,094.19	60,000.00	6,750.00	54,160.00		47,080.00
Interest on Unfunded Debt...	115,206.92										
Amortization of Discount on Funded Debt.............											
Maintenance of Invest.Organz...	11,242.72										
Income tranf. to Other Cos...											
Misc.Income Charges.........	25,523.43										
Total Deductions from G.In.	14,815,561.74	435,593.07	46,920.90	9,528.50	69,056.98	141,003.79	69,685.35	17,366.45	63,421.00	10,939.70	65,038.55
Net Income.............	9,831,715.93	x152,096.72	x44,637.79	2,252.66	x74,913.13	x36,060.08	x99,442.92	x26,305.02	x103,513.70	x29,588.20	x114,446.45

# To reflect Railway Operating Income on the same basis as used in the Act of March 21, 1918, whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income.	20,889,029.44	149,205.95	x5,702.66	21,776.16	x7,265.07	104,749.45	x30,565.77	x9,052.81	x40,092.70	x18,669.00	x49,407.90
Hire of Equipment-Net...	x481,051.54	x25,242.90	x25,000.90	x9,528.50	x32,498.60	x47,909.60	x9,347.85	x10,616.45	x9,261.00	x10,939.70	x17,958.55
Joint Facility Rent-Net.	x636,096.17	x136,422.53	7,985.77		1,297.10		x309.67				
Net Railway Operating Income.......	19,771,881.73	x12,459.48	x22,717.79	12,247.66	x38,466.57	56,839.85	x40,223.29	x19,669.26	x49,353.70	x29,608.70	x67,366.45

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

x Denotes Red in Copy

INCOME ACCOUNT

YEAR ENDED JUNE 30,1916.

	A.G.S.	A.&C.MTN.	BLUE RIDGE	CUMB.RR.	D. & W.	G.S. & F.	HARTWELL	M. & O.	NOR. ALA.	TALL.FALLS.	V.& S.W.
OPERATING INCOME											
Railway Operating Revenue	5,641,401.69	9,080.96	202,329.35	62,038.54	369,268.14	2,445,408.43	23,673.75	11,868,037.78	668,623.92	117,546.43	1,959,705.00
Railway Operating Expenses	3,761,382.92	7,724.64	140,495.72	41,914.23	195,059.40	1,833,852.86	18,726.82	8,533,736.58	388,115.53	101,381.41	1,461,964.00
Net Rev. from Ry.Operations	1,880,018.77	1,356.32	61,833.63	20,124.31	174,208.74	611,555.57	4,946.93	3,334,301.20	280,508.39	16,160.02	497,742.00
Railway Tax Accruals	198,420.33	267.09	7,597.78	563.72	15,766.77	137,075.33	772.83	406,384.00	32,524.80	6,101.62	85,428.00
Uncollectible Railway Revenues	297.35		4.64			3,425.70	1.60	2,716.80	24.44	1.09	71.00
# Railway Operating Income	1,681,301.19	1,089.23	54,231.21	19,560.59	158,441.97	471,054.54	4,172.50	2,925,200.40	247,959.15	10,057.31	412,242.00
NON OPERATING INCOME											
Hire of Frt.Cars.Cr.Balance	203,110.66					72,244.48		186,760.71			235,128.00
Rent from Locomotives											1,211.00
Rent from Train Cars										129.57	621.00
Rent from Floating Equipment											
Rent from Work Equipment											
Jt.Facility Rent Income	52,710.93	150.00	69.23			10,250.66		40,760.63	54,360.20	97.72	5,639.00
Income from Lease of Road											
Misc. Rent Income			904.57		200.00	4,125.68	60.00	5,155.03	83.30	72.00	1,604.00
Misc.Non-Operating Phys:Prop						333.65			170.20		1,045.00
Separately Operated Properties - Profit											
Dividend Income						8,650.00					
Income from Funded Securities	120,333.56					750.00					
Income from Unfunded S&A					613.08	7,341.61		14,548.04	107.72		1,733.00
Income from Sinking and Other Reserve Funds											
Release of Premiums on Funded Debt											
Contributions from Other Cos											
Miscellaneous Income	7,759.42							10,065.81			
Total Non-Operating Income	383,914.57	150.00	973.80		813.08	103,696.08	60.00	257,290.22	54,721.42	299.29	246,982.00
Gross Income	2,065,215.76	1,239.23	55,205.01	19,560.59	159,255.05	574,750.62	4,242.50	3,182,490.62	302,680.57	10,356.60	659,224.00
DEDUCTIONS FROM GROSS INCOME											
Hire of Frt.Cars-Dr.Balance			12,645.98	11,579.14	9,972.27		669.60		77,751.26	1,513.22	
Rent for Locomotives			805.08				277.22		43,657.96		2,003.00
Rent for Pass.Train Cars			2,094.96		61.81		205.60		4,955.90		2,396.00
Rent for Work Equipment			8.78						285.36	1.58	
Jt.Facility Rents	97,870.11		240.00		1,568.75	45,516.23			633.29	835.80	14,105.00
Rent for Leased Roads	18,102.80		4,000.00					558,573.17			10,000.00
Miscellaneous Rents				62.54	134.44				360.00	60.00	
Separately Operated Properties - Loss	131,302.60										
Miscellaneous Tax Accruals						472.12					
Interest on Funded Debt	354,389.83		7,850.00	16,911.96	102,565.95	294,940.00	1,000.00	1,520,740.84	95,480.36	75,950.00	399,665.00
Interest on Unfunded Debt		226.41	.47		909.51	13,210.11		67,462.07		376.67	7.00
Amoritization of Discount on Funded Debt	2,703.08										
Maintenance of Invest.Organz											
Income transf. to Other Cos											
Misc. Income Charges	489.55					871.03		182,584.52			1,959.00
Total Deductions from G.Inc.	604,857.97	226.41	27,645.27	28,553.64	115,212.73	354,964.49	2,152.42	2,329,360.60	223,124.13	78,737.27	430,135.00
Net Income	1,460,357.79	1,012.82	27,559.74	X8,993,05	44,042.32	219,766.13	2,080.08	853,130.02	79,556.44	X68,380.67	229,089.00

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and

ATING INCOME

Hire of Frt.Cars.Cr.Balance....	203,110.66					72,244.48		186,760.71			235,128.00
Rent from Locomotives..........											1,211.00
Rent from Train Cars...........										129.57	621.00
Rent from Floating Equipment...											
Rent from Work Equipment.......											
Jt.Facility Rent Income........	52,710.93	150.00	69.23			10,250.66		40,760.63	54,360.20	97.72	5,639.00
Income from Lease of Road......											
Misc. Rent Income..............			904.57		200.00	4,125.68	60.00	5,155.03	83.30	72.00	1,604.00
Misc.Non-Operating Phys.Prop...						333.65			170.20		1,045.00
Separately Operated Properties - Profit................											
Dividend Income................						8,650.00					
Income from Funded Securities..	120,333.56					750.00					
Income from Unfunded S&A.......					613.08	7,341.61		14,548.04	107.72		1,733.00
Income from Sinking and Other.. Reserve Funds..................											
Release of Premiums on Funded Debt....................											
Contributions from Other Cos...											
Miscellaneous Income...........	7,759.42							10,065.81			
Total Non-Operating Income....	383,914.57	150.00	973.80		813.08	103,696.08	60.00	257,290.22	54,721.42	299.29	246,982.00
Gross Income..............	2,065,215.76	1,239.23	55,205.01	19,560.59	159,255.05	574,750.62	4,242.50	3,182,490.62	302,680.57	10,356.60	659,224.00

DEDUCTIONS FROM GROSS INCOME

Hire of Frt.Cars-Dr.Balance....			12,645.98	11,579.14	9,972.27		669.60		77,751.26	1,513.22	
Rentfor Locomotives............			805.08				277.22		43,657.96		2,003.00
Rent for Pass.Train Cars.......			2,094.96		61.81		205.60		4,955.90		2,396.00
Rent for Work Equipment........			8.78						285.36	1.58	
Jt.Facility Rents..............	97,870.11		240.00		1,568.75	45,516.23		558,573.17	633.29	835.80	14,105.00
Rent for Leased Roads..........	18,102.80		4,000.00								10,000.00
Miscellaneous Rents............				62.54	134.44				360.00	60.00	
Separately Operated Properties - Loss..................	131.302.60										
Miscellaneous Tax Accruals.....						472.12					
Interest on Funded Debt........	354,389.83		7,850.00	16,911.96	102,565.95	294,940.00	1,000.00	1,520,740.84	95,480.36	75,950.00	399,665.00
Interest on Unfunded Debt......		226.41	.47		909.51	13,210.11		67,462.07		376.67	7.00
Ameritization of Discount on Funded Debt....................	2,703.08										
Maintenance of Invest.Organz...											
Income transf. to Other Cos....											
Misc. Income Charges...........	489.55					871.03		182,584.52			1,959.00
Total Deductions from G.Inc..	604,857.97	226.41	27,645.27	28,553.64	115,212.73	354,964.49	2,152.42	2,329,360.60	223,124.13	78,737.27	430,135.00
Net Income...............	1,460,357.79	1,012.82	27,559.74	x8,993,05	44,042.32	219,766.13	2,080.08	853,130.02	79,556.44	x68,380.67	229,089.00

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income.......	1,681,301.19	1,089.23	54,231.21	19,560.59	158,441.97	471,054.54	4,172.50	2,925,200.40	247,959.15	10,057.31	412,242.00
Hire of Equipment-Net..........	203,110.66		x15,554.80	x11,579.14	x10,034.08	72,244.48	x1,152.42	186,760.71	x126,650.48	x1,385.23	232,561.00
Jt.Facility Rent-Net...........	x45,159.18	150.00	x170.77		x1,568.75	x32,265.57		x517,812.54	53,726.91	x 738.08	x8,466.00
Net Railway Operating Income...	1,839,252.67	1,239.23	38,505.64	7,981.45	146,839.14	508,033.45	3,020.08	2,594,148.57	175,035.58	7,934.00	636,337.00

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

x Denotes Red in Copy

INCOME ACCOUNT

YEAR ENDED JUNE 30, 1917.

	SOU.RY.CO.	SOU.RY.CO. IN KEN.	CUMB.RY.CO.	STATE UNIVERSITY RAILROAD	ROSEWELL RAILROAD COMPANY	TENN. AND CAR. SOU.	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
OPERATING INCOME								
Railway Operating Revenues...	79,318,336.22	1,824,733.55	36,264.50	40,890.17	13,234.61	114,080.01	13,974.04	26,811.87
Railway Operating Expense....	51,864,796.02	1,472,051.89	39,146.01	26,583.63	20,152.78	86,331.73	29,096.42	91,977.68
Net Rev.from Ry.Operations...	27,453,540.20	352,681.66	x2,881.51	14,306.54	x6,918.17	27,748.28	x15,122.38	x65,165.81
Railway Tax Accruals.........	3,342,162.58	37,829.47	2,664.26	659.12	1,587.37	2,697.85	1,146.11	5,677.38
Uncollectible Ry.Revenues....	31,350.92	819.91	11.29	16.09	5.15	31.57	3.25	73.19
#Railway Operating Income....	24,080,026.70	314,032.28	x5,557.06	13,631.33	x8,510.69	25,018.86	x16,271.74	x70,916.38
NON-OPERATING INCOME								
Hire of Frt.Cars-Cr.Bal......	223,796.08							
Rent from Locomotives........		91,250.00						
Rent from Pass.Train Cars....		41,975.00						
Rent from Work Equipment.....								
Jt.Facility Rent Income......	294,954.29							
Income from Lease of Road....	18,897.78							
Miscellaneous Rent Income....	138,295.72	2,609.00	8.64	5.00	35.00		36.90	
Misc.Non-Operating Physical Property...........	36,343.65	x143.94		x1.95				
Separately Operated Prop.....								
Dividend Income..............	1,220,890.33							
Income from Funded Securts...	950,381.90							
Income from Unfunded S&A.....	364,308.55							
Income from Sinking and Other Reserve Funds.........								
Release of Premiums on Funded Debt.................								
Contributions from Other Companies								
Miscellaneous Income	32,023.37							
Total Non-Operating Income..	3,279,891.67	135,690.06	8.64	3.05	35.00		36.90	
Gross Income.............	27,359,918.37	449,722.34	x5,548.42	13,634.38	x8,475.69	25,018.86	x16,234.84	x70,916.38
DEDUCTIONS FROM GROSS INCOME								
Hire of Frt.Cars-Dr.Balance..	93,397.52	72,617.75	22,636.70	10,057.65	10,143.05	20,663.99	8,188.00	14,569.75
Rent for Locomotives.........		115,500.00						
Rent for Pass.Train Cars.....		17,445.00						
Rent for Work Equipment......								
Joint Facility Rents.........	923,808.46	129,618.87	3,406.64					
Rent for Leased Roads........	1,939.066.63							
Miscellaneous Rents..........	50,179.48	993.80						
Separately Operated Prop-Loss	464,695.83							
Interest on Funded Debt......	11,383,215.02	139,850.00	21,920.00		6,750.00	54,160.00		47,080.00
Interest on Unfunded Debt....	70,033.26							
Amoritization of Discount on Funded Debt..............								
Maintenance of Invest.Organz.								
Income transfd.to other Cos..								
Misc. Income Charges.........	128,562.87							
Total Deductions from G [illegible]	14,959,561.55	476,025.42	47,963.34	10,057.65	16,893.05	74,823.90	8,188.00	61,649.75
Net Income............	12,400,356.82	x26,303.08	x53,511.76	3,576.73	x25,368.74	x49,805.04	x24,422.84	x132,566.13

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To reflect the Railway Operating Income on the same basis as used in the Act of March 21,1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be Annual Railway

#Railway Operating Income.....	24,080,026.70	314,032.28	x5,557.06	13,631.33	x8,510.69	25,018.86	x16,271.74	x70,916.38
NON-OPERATING INCOME								
Hire of Frt.Cars-Cr.Bal......	223,796.08							
Rent from Locomotives........		91,250.00						
Rent from Pass.Train Cars....		41,975.00						
Rent from Work Equipment.....								
Jt.Facility Rent Income......	294,954.29							
Income from Lease of Road....	18,897.78							
Miscellaneous Rent Income....	138,295.72	2,609.00	8.64	5.00	35.00		36.90	
Misc.Non-Operating Physical Property...........	36,343.65	x143.94		x1.95				
Separately Operated Prop.....								
Dividend Income..............	1,220,890.33							
Income from Funded Securts...	950,381.90							
Income from Unfunded S&A.....	364,308.55							
Income from Sinking and Other Reserve Funds..........								
Release of Premiums on Funded Debt................								
Contributions from Other Companies								
Miscellaneous Income	32,023.37							
Total Non-Operating Income..	3,279,891.67	135,690.06	8.64	3.05	35.00		36.90	
Gross Income.............	27,359,918.37	449,722.34	x5,548.42	13,634.38	x8,475.69	25,018.86	x16,234.84	x70,916.38
DEDUCTIONS FROM GROSS INCOME								
Hire of Frt.Cars-Dr.Balance..	93,397.52	72,617.75	22,636.70	10,057.65	10,143.05	20,663.90	8,188.00	14,569.75
Rent for Locomotives.........		115,500.00						
Rent for Pass.Train Cars.....		17,445.00						
Rent for Work Equipment......								
Joint Facility Rents.........	923,808.46	129,618.87	3,406.64					
Rent for Leased Roads........	1,939.066.63							
Miscellaneous Rents..........	50,179.48	993.80						
Separately Operated Prop-Loss	464,695.83							
Interest on Funded Debt......	11,383,215.02	139,850.00	21,920.00		6,750.00	54,160.00		47,080.00
Interest on Unfunded Debt....	70,033.26							
Amoritization of Discount on Funded Debt...............								
Maintenance of Invest.Organz.								
Income transfd.to other Cos..								
Misc. Income Charges.........	128,562.87							
Total Deductions from G.Inc.	14,959,561.55	476,025.42	47,963.34	10,057.65	16,893.05	74,823.90	8,188.00	61,649.75
Net Income...............	12,400,356.82	x26,303.08	x53,511.76	3,576.73	x25,368.74	x49,805.04	x24,422.84	x132,566.13

To reflect the Railway Operating Income on the same basis as used in the Act of March 21,1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be Annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income....	24,080,026.70	314,032.28	x5,557.06	13,631.33	x8,510.69	25,018.86	x16,271.74	x70,916.38
Hire of Equipment - Net.....	223,796.08-R	x72,337.75	x22,636.70	x10,057.65	x10,143.05	x20,663.90	x8,188.00	x14,569.75
Jt.Facility Rent - Net......	x628,854.17	x129,618.87	x3,406.64					
Net Railway Operating Income	23,674,968.61	112,075.66	x31,600.40	3,573.68	x18,653.74	4,354.96	x24,459.74	x85,486.13

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

x Denotes Red in Copy

INCOME ACCOUNT

YEAR ENDED JUNE 30, 1917.

	A.G.S.	A. & Y.	A.& C.Mtn	BLUE RIDGE	CUMB.R.R.	C.& T.S.	D.& W.	G.S. & F.	HARTWELL	H.P.R.A.&S.	M. & Q.	N.C. & N.E
OPERATING INCOME												
Railway Operating Revenues........	6,337,923.78	483,650.36	12,656.70	223,218.41	45,676.28	21,243.84	388,122.69	2,797,563.17	25,845.02	100,959.07	12,859,865.67	4,403,622.
Railway Opeating Expenses.........	4,114,675.32	435,281.34	17,262.62	147,617.80	39,956.80	15,762.02	216,962.28	2,106,780.08	19,224.45	91,309.28	9,578,197.71	2,865.945.
Net Rev. from Ry.Operations.....	2,223,248.46	48,369.02	X4,605.92	75,600.61	5,719.48	5,481.82	171,150.41	690,783.09	6,620.57	9,649.79	3,281,667.96	1,537,676.
Railway Tax Accruals.............	253,618.25	24,834.87	318.56	8,007.69	685.25	420.99	17,622.61	137,340.07	652.37	4,903.69	524,684.98	257,398.
Uncollectible Ry. Revenues........	356.25	74.67		12.50			16.25	1,400.55	16.37	12.88	2,025.70	1,125.
# Railway Operating Income..........	1,969,273.96	23,459.48	X4,924.48	67,580.42	5,034.23	5,060.83	153,511.55	552,042.47	5,951.83	4,733.22	2,754,957.28	1,279,153.
NON-OPERATING INCOME												
Hire of Frt.Cars-Cr.Balance.......	489,303.34							219,751.70			931,371.12	121,104.
Rent from Locomotives.............	9,731.19	2,145.12		320.00				10,227.40		423.32		6,181.
Rent from Pass.Train Cars.........	56,152.72	489.06		820.74			8.48	26,504.87		111.66		32,908.
Rent from Work Equipment..........	17,796.27	148.32						2,075.08				880.
Jt.Facility Rent Income............	51,374.23	4.89	150.00	113.30		1.25		11,584.12		1,050.00	40,017.52	83,761.
Income from Lease of Rent.........												
Miscellaneous Rent Income..........	292.95	780.66		999.36	307.94	90.00	160.92	5,111.20	118.29	171.06	16,286,35	593.
Misc. Non-Operating Phys.Prop.....	1,323.59				X144.30			1,986.28				
Separately Operated Properties....												
Dividend Income....................	121,890.89							2,636.63				
Income from Funded Securities.....	9.60							750.00				
Income from Unfunded S. & A.......	18,419.30						613.04	9,451.05			19,890.51	44,193.2
Income from Sinking & Other Reserve Funds...................	184.91				209.45							
Release of Premiums on Funded Debt												
Contributions from Other Cos......												43,998.
Miscellaneous Income...............	1,832.50						35.00	1.00			49,486.11	3.
Total Non-Operating Income......	768,312.49	3,568.05	150.00	2,253.40	373.09	91.25	817.44	290,079.73	118.29	1,756.04	1,057,051.61	334,425.
Gross Income.....................	2,737,586.45	27,027.53	X4,774.48	69,833.82	5,407.32	5,152.08	154,328.99	842,121.80	6,070.12	6,489.26	3,812,008.89	1,613,578.
DEDUCTIONS FROM GROSS INCOME												
Hire of Frt.Cars-Dr.Balance.......		45,851.59	192.00	11,931.09	12,583.57	5,965.37	120.69		1,161.30	12,983.33		
Rent for Locomotives..............	7,971.84	10,920.54		788.08		2,461.50		38.71	192.00	3,616.36		9,806.
Rent for Pass.Train Cars..........	55,449.46	10,250.79		2,533.33		92.33	54.20	24,750.73	1.20	1,013.96		39,198.
Rent for Work Equipment...........	580.39	865.49		56.00				13.00		313.60		1,280.
Joint Facility Rents..............	109,549.56	672.89		240.00		31.92	1,569.25	50,223.04			584,017.77	104,883.
Rent for Leased Roads.............	18,206.40			4,000.00								
Miscellaneous Rents...............	157.00				62.64		25.00					
Separately Operated Prop.-Loss....	139,632.42											
Interest on Funded Debt...........	400,434.77	60,000.00		5,000.00	51,399.96	27,720.00	52,600.00	312,025.72	1,000.00	24,120.00	1,531,884.86	394,336.
Interest on Unfunded Debt.........		106.24	226.42	2,136.91		14.32	53,157.23	11,502.50		20,666.76	29,586.37	9,578.
Amoritization of Discount on Funded Debt......................							93.70					2,773.
Maintenance of Invest.Organztn....												
Income tranfd.to other Cos........												
Miscellaneous Income Charges......	32.30	568.60			36.88			1,815.53			184,115.51	183.
Total Deductions from G.Inc.....	732,014.14	129,236.14	418.42	26,685.41	64,083.05	36,285.44	107,620.07	400,369.23	2,354.50	62,713.91	2,329,604.51	562,041.
Net Income.......................	2,005,572.31	X102,208.61	X5,192.90	43,148.41	X58,675.73	X31,133.36	46,708.92	441,752.57	3,715.62	X56,224.65	1,482,404.38	1,051,536.

# To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the

INCOME ACCOUNT

YEAR ENDED JUNE 30, 1917..

EXHIBIT B

G.S.	A. & Y.	A.& C.Mtn	BLUE RIDGE	CUMB.R.R.	C.& T.S.	D.& W.	G.S. & F.	HARTWELL	H.P.R.A.&S.	M. & O.	N.C. & N.E.	NOR.ALA.	TALL FALLS	YADKIN
,337,923.78	483,650.36	12,656.70	223,218.41	45,676.28	21,243.84	388,122.69	2,797,563.17	25,845.02	100,959.07	12,859,865.67	4,403,622.42	792,047.48	131,068.16	358,712.33
,114,675.32	435,281.34	17,262.62	147,617.80	39,956.80	15,762.02	216,962.28	2,106,780.08	19,224.45	91,309.28	9,578,197.71	2,865,945.69	457,317.36	109,152.46	195,580.94
,223,248.46	48,369.02	x4,605.92	75,600.61	5,719.48	5,481.82	171,160.41	690,783.09	6,620.57	9,649.79	3,281,667.96	1,537,676.73	334,730.12	21,915.70	163,131.39
253,618.25	24,834.87	318.56	8,007.69	685.25	420.99	17,632.61	137,340.07	652.37	4,903.69	524,684.98	257,398.41	34,288.19	5,885.19	3,673.52
356.25	74.67		12.50			16.25	1,400.55	16.37	12.88	2,025.70	1,125.30	5.94	83.34	7.23
,969,273.96	23,459.48	x4,924.48	67,580.42	5,034.23	5,060.83	153,511.55	552,042.47	5,951.83	4,733.22	2,754,957.28	1,279,153.02	300,435.99	15,947.17	159,450.64
489,303.34							219,751.70			931,371.12	121,104.60			
9,731.19	2,145.12		320.00				10,227.40		423.32		6,181.32	2,219.23	285.00	6,155.29
56,152.72	489.06		820.74			8 .48	26,504.87		111.66		32,908.10		272.70	348.72
17,796.27	148.32						2,075.08				880.36	1,421.16	3.98	175.49
51,374.23	4.89	150.00	113.30		1.25		11,584.12		1,050.00	40,017.52	83,761.96	52,760.84	51.24	
292.95	780.66		999.36	307.94	90.00	160.92	5,111.20	118.29	171.06	16,286.35	593.64	69.20	82.00	165.22
1,323.59				x144.30			1,986.28					245.83		
121,890.89							2,636.63							
9.60							750.00							
18,419.30						613.04	9,451.05			19,890.51	44,193.23	109.47		
184.91				209.45										
											43,998.88			
1,832.50						35.00	1.00			49,486.11	3.20			
768,312.49	3,568.05	150.00	2,253.40	373.09	91.25	817.44	290,079.73	118.29	1,756.04	1,057,051.61	334,425.29	56,823.73	694.92	6,844.72
737,586.45	27,027.53	x4,774.48	69,833.82	5,407.32	5,152.08	154,328.99	842,121.80	6,070.12	6,489.26	3,812,008.89	1,613,578.31	357,261.72	16,642.09	166,295.36
	45,851.59	192.00	11,931.09	12,583.57	5,965.37	120.69		1,161.30	12,983.33			83,237.67	2,495.04	27,880.07
7,971.84	10,920.54		788.08		2,461.50		38.71	192.00	3,616.36		9,806.05	53,050.97		7,684.32
55,449.46	10,250.79		2,533.33		92.33	54.20	24,750.73	1.20	1,013.96		39,198.17	4,661.32	280.27	3,133.46
580.39	865.49		56.00				13.00		313.50		1,280.61	1,982.36	11.18	1,221.05
109,549.56	672.89		240.00		31.92	1,569.25	50,223.04			584,017.77	104,883.66	x36.47	413.20	
18,206.40			4,000.00											
157.00				62.64		25.00						430.00	60.00	
139,632.42														
400,434.77	80,000.00		5,000.00	51,399.96	27,720.00	52,600.00	312,025.72	1,000.00	24,120.00	1,531,884.86	394,336.68	82,500.00	75,950.00	36,900.00
	106.24	226.42	2,136.91		14.32	53,157.23	11,502.50		20,666.76	29,586.37	9,578.97	23,652.67	1.65	65,972.01
						93.70					2,773.92			
32.30	568.60			36.88			1,815.53			184,115.51	183.41			
732,014.14	129,236.14	418.42	26,685.41	64,083.05	36,285.44	107,620.07	400,369.23	2,354.50	62,713.91	2,329,604.51	562,041.47	249,478.52	79,211.34	142,790.91
,005,572.31	x102,208.61	x5,192.90	43,148.41	x58,675.73	x31,133.36	46,708.92	441,752.57	3,715.62	x56,224.65	1,482,404.38	1,051,536.84	107,783.20	x62,569.25	23,504.45

NON-OPERATING INCOME												
Hire of Frt.Cars-Cr.Balance.......	489,303.34							219,751.70			931,371.12	121,104.
Rent from Locomotives.............	9,731.19	2,145.12		320.00				10,227.40		423.32		6,181.
Rent from Pass.Train Cars..........	56,152.72	489.06		820.74			8.48	26,504.87		111.66		32,908.
Rent from Work Equipment..........	17,796.27	148.32						2,075.08				880.
Jt.Facility Rent Income............	51,374.23	4.89	150.00	113.30		1.25		11,584.12		1,050.00	40,017.52	83,761.
Income from Lease of Rent..........												
Miscellaneous Rent Income..........	292.95	780.66		999.36	307.94	90.00	160.92	5,111.20	118.29	171.06	16,286,35	593.
Misc. Non-Operating Phys.Prop.....	1,323.59				x144.30			1,986.28				
Separately Operated Properties....												
Dividend Income.....................	121,890.89							2,636.63				
Income from Funded Securities.....	9.60							750.00				
Income from Unfunded S. & A.......	18,419.30						613.04	9,451.05			19,890.51	44,193.2
Income from Sinking & Other Reserve Funds......................	184.91				209.45							
Release of Premiums on Funded Debt												
Contributions from Other Cos......												43,998.
Miscellaneous Income..............	1,832.50						35.00	1.00			49,486.11	3.
Total Non-Operating Income......	768,312.49	3,566.05	150.00	2,253.40	373.09	91.25	817.44	290,079.73	118.29	1,756.04	1,057,051.61	334,425.
Gross Income......................	2,737,586.45	27,027.53	x4,774.48	69,833.82	5,407.32	5,152.08	154,328.99	842,121.80	6,070.12	6,489.26	3,812,008.89	1,613,578.
DEDUCTIONS FROM GROSS INCOME												
Hire of Frt.Cars-Dr.Balance.......		45,851.59	192.00	11,931.09	12,583.57	5,965.37	120.69		1,161.30	12,983.33		
Rent for Locomotives...............	7,971.84	10,920.54		788.08		2,461.50		38.71	192.00	3,616.36		9,806.
Rent for Pass.Train Cars...........	55,449.46	10,250.79		2,533.33		92.33	54.20	24,750.73	1.20	1,013.96		39,198.
Rent for Work Equipment............	580.39	865.49		56.00				13.00		313.50		1,280.
Joint Facility Rents...............	109,549.56	672.89		240.00		31.92	1,569.25	50,223.04			584,017.77	104,883.
Rent for Leased Roads..............	18,206.40			4,000.00								
Miscellaneous Rents................	157.00				62.64		25.00					
Separately Operated Prop.-Loss....	139,632.42											
Interest on Funded Debt...........	400,434.77	60,000.00		5,000.00	51,399.96	27,720.00	52,600.00	312,025.72	1,000.00	24,120.00	1,531,884.86	394,336.
Interest on Unfunded Debt..........		106.24	226.42	2,136.91		14.32	53,157.23	11,502.50		20,666.76	29,586.37	9,578.
Amoritization of Discount on Funded Debt.....................							93.70					2,773.
Maintenance of Invest.Organztn....												
Income tranfd.to other Cos........												
Miscellaneous Income Charges......	32.30	568.60			36.88			1,815.53			184,115.51	183.
Total Deductions from G.Inc.....	732,014.14	129,236.14	418.42	26,685.41	64,083.05	36,285.44	107,620.07	400,369.23	2,354.50	62,713.91	2,329,604.51	562,041.
Net Income.........................	2,005,572.31	x102,208.61	x5,192.90	43,148.41	x58,675.73	x31,133.36	46,708.92	441,752.57	3,715.62	x56,224.65	1,482,404.38	1,051,536.

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income..........	1,969,273.96	23,459.48	x4,924.48	67,580.42	5,034.23	5,060.83	153,511.55	552,042.47	5,951.83	4,732.22	2,754,957.28	1,279,153.
Hire of Equipment - Net............	508,982.83	x65,105.91	x192.00	x14,167.76	x12,583.57	x8,519.20	x166.41	233,756.61	x1,354.50	x17,392.17	931,371.12	110,789.
Joint Facility Rent - Net.........	x58,174.33	x668.00	150.00	x126.70		x30.67	x1,569.25	x38,638.92		1,050.00	x544,000.25	x21,121.7
Net Railway Operating Income......	2,420,082.46	x42,314.43	x4,966.48	53,285.96	x7,549.34	x3,489.04	151,775.89	747,160.16	4,597.33	x11,608.95	3,142,328.15	1,368,820.

NOTE----

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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1,969,273.96	23,459.48	x4,924.48	67,580.42	5,034.23	5,060.83	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			
489,303.34							219,751.70			931,371.12	121,104.60			
9,731.19	2,145.12		320.00				10,227.40		423.32		6,181.32	2,219.23	285.00	6,155.29
56,152.72	489.56		820.74			8.48	26,504.87		111.66		32,908.10		272.70	348.72
17,796.27	148.32						2,075.08				880.36	1,421.16	3.98	175.49
51,374.23	4.89	150.00	113.30		1.25		11,584.12		1,050.00	40,017.52	83,761.96	52,760.84	51.24	
292.95	780.66		999.36	307.94	90.00	160.92	5,111.20	118.29	171.06	16,286,35	593.64	69.20	82.00	165.22
1,323.59				x144.30			1,986.28					245.83		
121,890.89							2,636.63							
9.60							750.00							
18,419.30						613.04	9,451.05			19,890.51	44,193.23	109.47		
184.91				209.45										
											43,998.88			
1,832.50						35.00	1.00			49,486.11	3.20			
768,312.49	3,568.05	150.00	2,253.40	373.09	91.25	817.44	290,079.73	118.29	1,756.04	1,057,051.61	334,425.29	56,823.73	694.92	6,844.72
2,737,586.45	27,027.53	x4,774.48	69,833.82	5,407.32	5,152.08	154,328.99	842,121.80	6,070.12	6,489.26	3,812,008.89	1,613,578.31	357,261.72	16,642.06	166,295.36
	45,851.59	192.00	11,931.09	12,583.57	5,965.37	120.69		1,161.30	12,983.33			83,237.67	2,495.04	27,880.07
7,971.84	10,920.64		788.08		2,461.50		38.71	192.00	3,616.36		9,806.05	53,050.97		7,684.32
55,449.46	10,250.79		2,533.33		92.33	54.20	24,750.73	1.20	1,013.96		39,198.17	4,661.32	280.27	3,133.46
580.39	865.49		56.00				13.00		313.50		1,280.61	1,982.36	11.18	1,221.05
109,549.56	672.89		240.00		31.92	1,569.25	50,223.04			584,017.77	104,883.66	x36.47	413.20	
18,206.40			4,000.00											
157.00				62.64		25.00						430.00	60.00	
139,632.42														
400,434.77	60,000.00		5,000.00	51,399.96	27,720.00	52,600.00	312,025.72	1,000.00	24,120.00	1,531,884.86	394,336.68	82,500.00	75,950.00	36,900.00
	106.24	226.42	2,136.91		14.32	53,157.23	11,502.50		20,666.76	29,586.37	9,578.97	23,652.67	1.65	65,972.01
						93.70					2,773.92			
32.30	568.60			36.88			1,815.53			184,115.51	183.41			
732,014.14	129,236.14	418.42	26,685.41	64,083.05	36,285.44	107,620.07	400,369.23	2,354.50	62,713.91	2,329,604.51	562,041.47	249,478.52	79,211.34	142,790.91
2,005,572.31	x102,208.61	x5,192.90	43,148.41	x58,675.73	x31,133.36	46,708.92	441,752.57	3,715.62	x56,224.65	1,482,404.38	1,051,536.84	107,783.20	x62,569.25	23,504.45
,969,273.96	23,459.48	x4,924.48	67,580.42	5,034.23	5,060.83	153,511.55	552,042.47	5,951.83	4,732.22	2,754,957.28	1,279,153.02	300,435.99	15,947.17	159,450.64
508,982.83	x65,105.91	x192.00	x14,167.76	x12,583.57	x8,519.20	x166.41	233,756.61	x1,354.50	x17,392.17	931,371.12	110,789.55	x139,291.93	x2,224.81	x33,239.40
x58,174.33	x668.00	150.00	x126.70		x30.67	x1,569.25	x38,638.92		1,050.00	x544,000.25	x21,121.70	52,797.31	x361.96	
,420,082.46	x42,314.43	x4,966.48	53,285.96	x7,549.34	x3,489.04	151,775.89	747,160.16	4,597.33	x11,608.95	3,142,328.15	1,368,820.87	213,941.37	13,360.40	126,211.24

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ual Reports.

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INCOME ACCOUNT

YEAR ENDED DECEMBER 31,1918.

EXHIBIT B

	SOUTHERN	SOU.RY.CO. IN KEN.	CUMB.RY.CO.	STATE UNIVERSITY RAILROAD	ROSWELL RAILROAD COMPANY	TENN. AND CAR. SOU.	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
OPERATING INCOME								
Railway Operating Revenues........	123,579,934.81	2,594,978.47	43,485.79	46,428.36	28,479.46	208,828.29	14,675.69	57,485.98
Railway Operating Expenses........	88,831,129.21	2,573,379.08	77,213.88	38,067.90	40,158.00	91,628.77	41,358.03	117,490.21
Net Revenue from Ry.Operations.	34,748,805.60	21,599.39	X33,728.09	8,360.46	X11,678.54	117,199.52	X26,682.34	X60,004.22
Railway Tax Accruals...............	3,683,359.53	40,844.27	3,067.26	641.54	1,635.09	2,255.77	975.09	9,365.73
Uncollectible Railway Revenues...	43,862.79	1,098.94	16.01	38.34	8.62	52.46	13.02	12.69
# Railway Operating Income........	31,021,583.28	X20,343.32	X36,811.36	7,680.58	X12,322.25	114,891.29	X27,670.45	X69,382.65
NON-OPERATING INCOME								
Hire of Frt.Cars-Cr.Balance......								
Rent from Locomotives............	694,723.99							
Rent from Passenger Train Cars...	161,800.11							
Rent from Floating Equipment.....	3,215.31							
Rent from Work Equipment.........	43,704.56							
Joint Facility Rent Income.......	270,558.26	96.39	17,251.50					
Income from Lease of Road........								
Miscellaneous Rent Income........								
Misc.Non-Operating Phys.Prop.....								
Separately Operated Properties - Profit..................								
Income from Funded Securities....	2,177.09							
Income from Unfunded S. & A......	220,061.20							
Income from Sinking and Other Reserve Funds..................								
Release of Premiums on F. Debt...								
Miscellaneous Income.............	1,312,716.54							
Total Non-Operating Income......	2,708,956.46	96.39	17,251.50					
Gross Income.................	33,730,539.74	X20,246.43	X19,559.86	7,680.58	X13,322.25	114,891.29	X27,670.45	X69,382.65
DEDUCTIONS FROM GROSS INCOME								
Hire of Frt.Cars-Debit Balance...	274,011.19	431,246.00	20,007.60	9,007.80	7,871.80	26,204.40	7,450.40	15,452.60
Rent for Locomotives.............	603,245.77							
Rent for Passenger Train Cars....	286,918.41							
Rent for Floating Equipment......								
Rent for Work Equipment..........	13,718.86							
Joint Facility Rents.............	1,015,665.28	153,697.61	11,607.28					
Rent for Leased Roads............								
Miscellaneous Rents..............								
Miscellaneous Tax Accruals.......								
Separately Operated Properties - Loss								
Interest on Funded Debt..........								
Interest on Unfunded Debt........	1,981.29							
Amortization of Discount on Funded Debt....................								
Income Tranfrd. to Other Cos.....								
Miscellaneous Income Charges.....	465,128.62							
Total Deductions from Gross Inc.	2,660,669.42	584,943.61	31,614.88	9,007.80	7,871.80	26,204.40	7,450.40	15,452.60
Net Income....................	31,069,870.32	X605,191.04	X51,174.74	X1,327.22	X21,194.05	88,686.89	X35,120.85	X84,835.25

#To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal control; such Act providing the basis for compensation to be Annual Railway Operating Income in the computation of which [illegible]

Railway Operating Income........	31,021,583.28	X20,343.32	X36,811.36	7,680.58	X12,322.25	114,891.29	X27,670.45	X69,382.65

NON-OPERATING INCOME

Hire of Frt.Cars-Cr.Balance......								
Rent from Locomotives.............	694,723.99							
Rent from Passenger Train Cars...	161,800.11							
Rent from Floating Equipment.....	3,215.31							
Rent from Work Equipment..........	43,704.56							
Joint Facility Rent Income........	270,558.26	96.39	17,251.50					
Income from Lease of Road.........								
Miscellaneous Rent Income.........								
Misc.Non-Operating Phys.Prop.....								
Separately Operated Properties - Profit..................								
Income from Funded Securities....	2,177.09							
Income from Unfunded S. & A......	220,061.20							
Income from Sinking and Other Reserve Funds..................								
Release of Premiums on F. Debt...								
Miscellaneous Income.............	1,312,716.54							
Total Non-Operating Income......	2,708,956.46	96.39	17,251.50					
Gross Income..................	33,730,539.74	X20,246.43	X19,559.86	7,680.58	X13,322.25	114,891.29	X27,670.45	X69,382.65

DEDUCTIONS FROM GROSS INCOME

Hire of Frt.Cars-Debit Balance...	274,011.19	431,246.00	20,007.60	9,007.80	7,871.80	26,204.40	7,450.40	15,452.60
Rent for Locomotives..............	603,245.77							
Rent for Passenger Train Cars....	286,918.41							
Rent for Floating Equipment......								
Rent for Work Equipment..........	13,718.86							
Joint Facility Rents..............	1,015,665.28	153,697.61	11,607.28					
Rent for Leased Roads.............								
Miscellaneous Rents...............								
Miscellaneous Tax Accruals.......								
Separately Operated Properties - Loss								
Interest on Funded Debt..........								
Interest on Unfunded Debt........	1,981.29							
Amortization of Discount on Funded Debt....................								
Income Tranfrd. to Other Cos.....								
Miscellaneous Income Charges.....	465,128.62							
Total Deductions from Gross Inc.	2,660,669.42	584,943.61	31,614.88	9,007.80	7,871.80	26,204.40	7,450.40	15,452.60
Net Income....................	31,069.870.32	X605,191.04	X51,174,74	X1,327.22	X21,194.05	88,686.89	X35,120.85	X84,835.25

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal control; such Act providing the basis for compensation to be Annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income.........	31,021,583.28	X20,343.82	X36,811.36	7,680.58	X13,322.25	114,891.29	X27,670.45	X69,382.65
Hire of Equipment.-Net...........	X274,450.06	X431,246.00	X20,007.60	X9,007.80	X7,871.80	X26,204.40	X7,450.40	X15,452.60
Joint Facility Rent - Net........	X745,107.02	X153,601.22	5,644.23					
Net Railway Operating Income.....	30,002,026.20	X605,191.04	X51,174.74	X1,327.22	X21,194.05	88,686.89	X35,120.85	X84,835.25

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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INCOME ACCOUNT
YEAR ENDED DECEMBER 31, 1918.

	A. G. A.	A. & Y.	A.&C.Mtn.	BLUE RIDGE	CUMB.R.R.	C. & T.S.	D & W	G.S.& F.	HARTWELL	H.P.R.A.&S.	M & O.	N.O.& N.E.	TALL. FA
OPERATING INCOME													
Railway Operating Revenue...	9,296,634.94	614, 031.54	10,507.67	278,411.50		22,854.05	467,714.28	3,394,800.98	33,378.39	114,340.42	14,840,901.48	6,474,717.62	156,194.
Railway Operating Expense...	7,103,514.85	663,629.41	16,380.84	248,857.47		23,580.54	371,523.09	3,249,537.79	31,206.17	121,302.76	14,131,172.23	5,192,415.21	173,908.
Net Rev. from Ry.Operations.	2,193,120.09	X49,597.87	X5,873.17	29,554.03		X726.49	96,191.19	445,263.19	2,172.22	X6,962.34	709,729.25	1,282,302.41	X17,714.
Railway Tax Accruals........	264,596.47	26,734.85	335.00	8,793.48		541.39	17,412.24	171,429.34	921.21	5,127.67	525,234.00	309,590.95	6,401.
Uncollectible Ry.Revenues...	3,110.90	747.52		16.90		1.50		920.74		7.34	2,248.81	609.77	
# Railway Operating Income.	1,925,412.72	X77,080.24	X6,208.17	20,743.65		X1,269.38	78,778.95	272,913.11	1,251.01	X12,097.35	182.246.44	597,101.69	X24,115.
NON-OPERATING INCOME													
Hire of Frt.Cars-Cr.Balance.	140,069.04						2,407.37	91,276.13			206,800.88	64,880.23	
Rent from Locomotives.......	50,544.08	2,911.64						31,456.85			87,565.52	29.248.79	
Rent from Passenger Train Cars	38,332.48							13,320.11			18,605.88	11,662.85	
Rent from Floating Equipment											16,126.45	3,365.03	
Rent from Work Equipment	4,753.20							4,135.75					
Joint Facility Rent Income..	51,865.35	184.09	150.00	80.10				13,203.84			46,153.45	121,255.71	30.9
Income from Lease of Road...													
Miscellaneous Rent Income...											17.90		
Misc.Non-Operating Phys.Prop.											605.72	14,807.84	
Separately Operated Properties - Profit..............													
Income from Funded Securities								40.00					
Income from Unfunded S.& A...	24,315.17	272.07	23.74	408.87		9.75	1,021.34	3,861.92	105.51	113.17	7,091.77	49,189.68	102.3
Income from Sinking & Other Reserve Funds...............													
Release of Premiums on F. Debt.													
Miscellaneous Income........	131.755.18	8,070.09		3,597.22		339.56	5,432.88	27.067.93	383.65	1,760.80	72,411.09		3,310.9
Total Non.Operating Income.	441,634.50	11,445.89	173.74	4,086.19		349.31	9,861.59	184,362.53	489.16	1,873.97	455,378.66	294,410.13	3,444.3
Gross Income.........	2,367,047.22	X65,634.35	X6,034.43	24,824.84		X920.07	88,640.54	457,275.64	1,740.17	X10,223.38	637.625.10	1,266,511.82	X20,670.9
DEDUCTIONS FROM GROSS INCOME													
Hire of Ft.Cars.Debit Balance		21,090.81		3,095.24		1,424.56			936.66	4,822.00			
Rent for Locomotives........	29,955.23	41,798.00	658.00	1,751.08		3,275.22		4,463.81	229.00	10,876.13	5,291.08	99,508.05	792.46
Rent for Passenger Train Cars.	38,863.69	7,127.29		1,881.21		60,34	5.02	12,863.98		511.61	14,909.55	31,587.53	
Rent for Floating Equipment...													3.36
Rent for Work Equipment......	1,865.45	277.42					465.50			113.00	4,352.74	1,053.04	
Joint Facility Rent..........	101,821.86	418.71		240.00		30.47	1,569.25	61,117.18			285,577.07	94,926.15	
Rent for Leased Roads........													420.89
Miscellaneous Rents..........											144.07		
Miscellaneous Tax Accruals...													
Separately Operated Properties - Loss..........													
Interest on Funded Debt......											11,042.56		
Interest on Unfunded Debt....													
Amortization of Discount on Funded Debt.................													
Income Transfrd. to other Cos.													
Miscellaneous Income Charge..	79,255.16	5,013.89	3.10	X1,768.66		X276.37		3,436.42	X37.15	X816.47		27,651.18	
Total Deductions from											48,791.72		X269.09
Gross Income.........	251,761.39	75,726.12	659.10	5,198.87		4,514.22	1,546.28	81,881.39	1,128.50	15,506.27	370,108.79	254,725.95	947.62
Net Income..........	2,115,285.83	X141,360.47	X5,693.53	19,630.97		X5,434.29	87,094.26	375.394.25	611.67	X25,729.65	267,516.31	1011,785.87	X21,618.52

To reflect the Railway Operating Income on the same basis as used in the Acts of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" [illegible] have the

INCOME ACCOUNT

YEAR ENDED DECEMBER 31, 1918.

A.	A. & Y.	A.&C.Mtn.	BLUE RIDGE	CUMB.R.R.	C. & T.S.	D & W	G.S.& F.	HARTWELL	H.P.R.A.&S.	M & O.	N.O.& N.E.	TALL. FALLS.	YADKIN	NOR. ALA.
34.94	614, 031.54	10,507.67	278,411.50		22,854.05	467,714.28	3,594,800.98	33,378.39	114,340.42	14,840,901.48	6,474,717.62	156,194.57	291,652.96	1,404,881.65
14.85	663,629.41	16,380.84	248,857.47		23,580.54	371,523.09	3,249,537.79	31,206.17	121,302.76	14,131,172.23	5,192,415.21	173,908.81	278,451.86	979,146.09
20.09	x49,597.87	X5,873.17	29,554.03		X726.49	96,191.19	445,263.19	2,172.22	x6,962.34	709,729.25	1,282,302.41	X17,714.24	13,201.10	425,735.56
96.47	26,734.85	335.00	8,793.48		541.39	17,412.24	171,429.34	921.21	5,127.67	525,234.00	309,590.95	6,401.01	4,795.22	48,370.07
10.90	747.52		16.90		1.50		920.74		7.34	2,248.81	609.77		36.32	14.00
12.72	x77,080.24	X6,208.17	20,743.65		X1,269.38	78,778.95	272,913.11	1,251.01	X12,097.35	182.246.44	597,101.69	X24,115.25	8,369.56	377,351.49
69.04						2,407.37	91,276.13			206,800.88	64,880.23			
44.08	2,911.64						31,456.85			87,565.52	29.248.79		10,623.92	9,882.52
32.48							13,320.11			18,605.88	11,662.85			
										16,126.45	3,365.03			
53.20							4,135.75							1,103.64
65.35	184.09	150.00	80.10				13,203.84			46,153.45	121,255.71	30.99		44,278.41
										17.90				
										605.72	14,807.84			
							40.00							
15.17	272.07	23.74	408.87		9.75	1,021.34	3,861.92	105.51	113.17	7,091.77	49,189.68	102.39	456.71	294.83
55.18	8,070.09		3,597.22		339.56	5,432.88	27.067.93	383.65	1,760.80	72,411.09		3,310.97	6,109.81	9,481.87
34.50	11,445.89	173.74	4,086.19		349.31	9,861.59	184,362.53	489.16	1,873.97	455,378.66	294,410.13	3,444.35	17,190.44	55,041.27
47.22	X65,634.35	X6,034.43	24,824.84		x920.07	88,640.54	457,275.64	1,740.17	X10,223.38	637.625.10	1,266,511.82	X20,670.90	25,560.00	442,392.76
	21,090.81		3,095.24		1,424.56			936.66	4,822.00					
55.23	41,798.00	656.00	1,751.08		3,275.22		4,463.81	229.00	10,876.13	5,291.08	99,508.05	792.46	9,221.87	109,795.08
63.69	7,127.29		1,881.21		60,34	5.02	12,863.98		511.61	14,909.55	31,587.53		23,728.12	123,190.08
												3.36	1,826.41	4,271.78
65.45	277.42					465.50			113.00	4,352.74	1,053.04			
21.86	418.71		240.00		30.47	1,569.25	61,117.18			285,577.07	94,926.15		89.50	3,011.39
												420.89		100.21
										144.07				
										11,042.56				
55.16	5,013.89	3.10	X1,768.66		X276.37		3,436.42	X37.15	X816.47	48,791.72	27,651.18	X269.09		15,864 .77
51.39	75,726.12	659.10	5,198.87		4,514.22	1,546.28	81,881.39	1,128.50	15,506.27	370,108.79	254,725.95	947.62	34,865.90	256,233.31
35.83	X141,360.47	X5,693.53	19,630.97		X5,434.29	87,094.26	375.394.25	611.67	X25,729.65	267,516.31	1011,785.87	X21,618.52	X9,305.90	186,159.45

# Railway Operating Income.	1,925,412.72	x77,080.24	X6,208.17	20,743.65	X1,269.38	78,778.95	272,913.11	1,251.01	X12,097.35	182.246.44	597,101.69	X24,115.2
NON-OPERATING INCOME												
Hire of Frt.Cars-Cr.Balance.	140,069.04					2,407.37	91,276.13			206,800.88	64,880.23	
Rent from Locomotives.......	50,544.08	2,911.64					31,456.85			87,565.52	29,248.79	
Rent from Passenger Train Cars	38,332.48						13,320.11			18,605.88	11,662.85	
Rent from Floating Equipment										16,126.45	3,365.03	
Rent from Work Equipment	4,753.20						4,135.75					
Joint Facility Rent Income..	51,865.35	184.09	150.00	80.10			13,203.84			46,153.45	121,255.71	30.9
Income from Lease of Road...												
Miscellaneous Rent Income...										17.90		
Misc.Non-Operating Phys.Prop.										605.72	14,807.84	
Separately Operated Properties - Profit.............												
Income from Funded Securities							40.00					
Income from Unfunded S.& A...	24,315.17	272.07	23.74	408.87	9.75	1,021.34	3,861.92	105.51	113.17	7,091.77	49,189.68	102.39
Income from Sinking & Other Reserve Funds...............												
Release of Premiums on F.Debt.												
Miscellaneous Income........	131.755.18	8,070.09		3,597.22	339.56	5,432.88	27.067.93	383.65	1,760.80	72,411.09		3,310.97
Total Non.Operating Income.	441,634.50	11,445.89	173.74	4,086.19	349.31	9,861.59	184,362.53	489.16	1,873.97	455,378.66	294,410.13	3,444.35
Gross Income........	2,367,047.22	X65,634.35	X6,034.43	24,824.84	x920.07	88,640.54	457,275.64	1,740.17	X10,223.38	637.625.10	1,266,511.82	X20,670.90
DEDUCTIONS FROM FROSS INCOME												
Hire of Ft.Cars.Debit Balance		21,090.81		3,095.24	1,424.56			936.66	4,822.00			792.46
Rent for Locomotives........	29,955.23	41,798.00	656.00	1,751.08	3,275.22		4,463.81	229.00	10,876.13	5,291.08	99,508.05	
Rent for Passenger Train Cars.	38,863.69	7,127.29		1,881.21	60,34	5.02	12,863.98		511.61	14,909.55	31,587.53	3.36
Rent for Floating Equipment...												
Rent for Work Equipment......	1,865.45	277.42				465.50			I13.00	4,352.74	1,053.04	
Joint Facility Rent..........	101,821.86	418.71		240.00	30.47	1,569.25	61,117.18			285,577.07	94,926.15	420.89
Rent for Leased Roads........												
Miscellaneous Rents..........										144.07		
Miscellaneous Tax Accruals...												
Separately Operated Properties - Loss..........												
Interest on Funded Debt......										11,042.56		
Interest on Unfunded Debt....												
Amortization of Discount on Funded Debt................												
Income Transfrd.to other Cos.												
Miscellaneous Income Charge..	79,255.16	5,013.89	3.10	X1,768.66	X276.37		3,436.42	X37.15	X816.47		27,651.18	X269.09
Total Deductione from										48,791.72		
Gross Income.........	251,761.39	75,726.12	659.10	5,198.87	4,514.22	1,546.28	81,881.39	1,128.50	15,506.27	370,108.79	254,725.95	947.62
Net Income..........	2,115,285.83	X141,360.47	X6,693.53	19,630.97	X5,434.29	87,094.26	375.394.25	611.67	X25,729.65	267,516.31	1011,785.87	X21,618.52

To reflect the Railway Operating Income on the same basis as used in the Acts of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income..	1,925,412.72	X77,080.24	X6,208.17	20,743.65	X1,269.38	78,778.95	272,913.11	1,251.01	X12,097.35	182,246.44	972,101.69	X24,115.25
Hire of Equipment - Net...	163,014.43	X67,381.88	X656.00	6,727.53	X5,760.02	2,036.85	122,861.05	X1,155.66	X15,322.74	304,545.36	X22,991.72	X795.82
Joint Facility Rent - Net..	X49,956.51	X234.62	150.00	X159.90	30.47	X1,569.25	X47,913.34			X239,423.62	26,329.55	X389.90
Net Railway Operating Income...............	2,038,470.64	X144,696.74	X6,714.17	13,856.22	X6,059.37	79,246.55	357,860.82	85.35	X28,420.09	247,368.18	975,439.52	X25,300.97

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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140,069.04					2,407.37	91,276.13			206,800.88	64,880.23			
50,544.08	2,911.64					31,456.85			87,565.52	29.248.79		10,623.92	9,882.52
38,332.48						13,320.11			18,605.88	11,662.85			
									16,126.45	3,365.03			
4,753.20						4,135.75							1,103.64
51,865.35	184.09	150.00	80.10			13,203.84			46,153.45	121,255.71	30.99		44,278.41
									17.90				
									605.72	14,807.84			
						40.00							
24,315.17	272.07	23.74	408.87	9.75	1,021.34	3,861.92	105.51	113.17	7,091.77	49,189.68	102.39	456.71	294.83
131.755.18	8,070.09		3,597.22	339.56	5,432.88	27.067.93	383.65	1,760.80	72,411.09		3,310.97	6,109.81	9,481.87
441,634.50	11,445.89	173.74	4,086.19	349.31	9,861.59	184,362.53	489.16	1,873.97	455,378.66	294,410.13	3,444.35	17,190.44	65,041.27
367,047.22	X65,634.35	X6,034.43	24,824.84	x920.07	88,640.54	457,275.64	1,740.17	X10,223.38	637.625.10	1,266,511.82	X20,670.90	25,560.00	442,392.76
	21,090.81		3,095.24	1,424.56			936.66	4,822.00					
29,955.23	41,798.00	656.00	1,751.08	3,275.22		4,463.81	229.00	10,876.13	5,291.08	99,508.05	792.46	9,221.87	109,795.08
38,863.69	7,127.29		1,881.21	60,34	5.02	12,863.98		511.61	14,909.55	31,587.55		23,728.12	123,190.08
											3.36	1,826.41	4,271.78
1,865.45	277.42				465.50			113.00	4,352.74	1,053.04			
101,821.86	418.71		240.00	30.47	1,569.25	61,117.18			285,577.07	94,926.15		89.50	3,011.39
											420.89		100.21
									144.07				
									11,042.56				
										27,651.17			
79,255.16	5,013.89	3.10	X1,768.66	X276.37		3,436.42	X37.15	X816.47					
									48,791.72		X269.09		15,864.77
251,761.39	75,726.12	659.10	5,198.87	4,514.22	1,546.28	81,881.39	1,128.50	15,506.27	370,108.79	254,725.95			
115,285.83	X141,360.47	X5,693.53	19,630.97	X5,434.29	87,094.26	375.394.25	611.67	X25,729.65	267,516.31	1011,785.87	947.62	34,865.90	256,233.31
											X21,618.52	X9,305.90	186,159.45

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25,412.72	X77,080.24	X6,208.17	20,743.65	X1,269.38	78,778.95	272,913.11	1,251.01	X12,097.35	182,246.44	972,101.69			
33,014.43	X67,381.88	X656.00	6,727.53	X5,760.02	2,036.85	122,861.05	X1,155.66	X15,322.74	304,545.36	X22,991.72	X24,115.25	8,369.56	377,351.49
9,956.51	X234.62	150.00	X159.90	30.47	X1,569.25	X47,913.34			X239,423.62	26,329.55	X795.82	X24,241.88	X229,282.17
											X389.90		44,178.20
8,470.64	X144,696.74	X6,714.17	13,856.22	X6,057.37	79,246.55	357,860.82	85.35	X28,420.09	247,368.18	975,439.52	X25,300.97	X15,872.32	192,247.52

re stated in accordance with
scribed by the Interstate
its Annual Reports.

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IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER SETTING CASES—Sept. 19, 1921

Came appellee by Counsel and filed motion for an oral argument. Which motion is submitted.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 21st day of September, 1921, the following order was entered to-wit:

Commonwealth of Kentucky, on Relation, etc. v. Southern Railway Co.—Woodford.

Commonwealth of Kentucky on Relation, etc. v. Southern Railway Co., Woodford.

The Court being sufficiently advised, it is considered that appellee's motion for an oral argument be and the same is hereby sustained, and said cases are set for hearing on October 21st, 1921.

[fol. 118] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ARGUMENT AND SUBMISSION—Oct. 21, 1921

These appeals coming on to be heard, were argued orally by Charles W. Milner for the appellee, and J. P. Hopson, for the appellants and submitted.

IN COURT OF APPEALS OF KENTUCKY

COMMONWEALTH OF KENTUCKY, on Relation of ROBERT HAWKINS, Sheriff, Appellant,
vs.
SOUTHERN RAILWAY COMPANY, Appellee,
and
COMMONWEALTH OF KENTUCKY, on Relation of ROBERT HAWKINS, Sheriff, Appellant,
vs.
SOUTHERN RAILWAY COMPANY, Appellee

JUDGMENT—Nov. 18, 1921

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that the judgment in each case be reversed, and cause remanded for proceedings, not inconsistent with the opinion herein, which is ordered to be certified to the said court.

It is further considered, that the appellant recover of the appellee, its costs herein expended.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—Nov. 18, 1921

Judge **THOMAS**:

The Commonwealth of Kentucky on relation of Robert Hawkins, Sheriff of Woodford County, filed two statements in the County Court of that county under the authority given by section 4241 of the Statutes by which is was sought to list for taxation as omitted property, for the years 1914-1918, both inclusive, the proportionate part of [fol. 119] the intangible property of defendant, Southern Railway Company, that it alleged, owned and controlled lines in Kentucky bore to its owned and controlled lines constituting its entire reilway system. The statement seeking the relief for the years 1914, 1915 and 1916 was filed against Southern Railway Company alone, and the one seeking the same relief for the years 1917 and 1918 joined with the company the Director General of Railroads, who for those two years operated defendant's railway system under the Federal Control Act. The facts governing the right to assess the property for each of the years are the same, and the two statements were heard and disposed os in the courts below as one case. In each statement it was averred in substance that defendant Southern Railway Company, which is a Virginia Corporation, owned, operated and controlled in round numvers, one hundred and twenty sever (127) miles of railroad in Kentucky, running from the city of Louisville, in Jefferson County, to Danville, in Boyle County, with branches running to Versailles, Georgetown, Lexington and perhaps other points, but which were ostensibly owned and operated by a Kentucky corporation known as "Southern Railway Company in Kentucky"; that is so owned, operated and controlled thirty eight and a fraction miles of railroad trackage in Kentucky, ostensibly owned and operated by the Mobile and Ohio Railroad Company; that it likewise owned, operated and controlled one and three fourths (1¾) miles of railroad in Bell County, ostensibly operated in the name of Cumberland Railway Company, and also owned, operated and controlled 12.9 miles of railroad in Knox County, Kentucky ostensibly owned and operated by the Cumberland Railroad Company; and that defendant entirely omitted to make any report to the Auditor of Public Accounts of the State for either of the years involved as is required by the provisions of section 4078 of the Statutes, as a basis for the assessment of Kentucky's portion of its intangible property and that none of said property had been assessed except that which was assessed to, and paid by, the ostensibly owning corporation as before mentioned, and which amounts so assessed and paid were not the true ones to which the State was entitled.

The answer to each statement denied the material allegations therein and affirmatively alleged the assessment and payment of the local franchise taxes due from the various divisional units of railroad lines referred to, as a bar to any right of recovery. Appropriate pleadings made the issues and upon submission the County Court dismissed each proceeding, from which the Commonwealth by the Sheriff, its relator, procuted an appeal to the Woodford Circuit Court and a similar judgment was rendered by that court in each case, to reverse which these appeals have been brought to this court and by agreement are heard together.

There were searching interrogatories attached to each statement which were unreservedly answered by the defendant, and those answers, including the exhibits filed therewith, and an agreed stipulation signed by the parties, [fol. 120] furnished the facts upon which both the County and the Circuit Court based their respective judgments, and which facts must also govern us in the disposition of these appeals. We will defer a consideration of the facts for the moment while we briefly notice the law in Kentucky with reference to taxing intangible property of corporations, both fireign and domestic, and the methods pointed out therein by which the value of such property has a taxing situs within the taxing authority for such purposes, may be ascertained and assessed.

Prior to the original enactment of sections 4077-4091, both inclusive of the Kentucky Statutes, being sub-division 1 of article 4 of Chapter 108, corporations neither assessed nor paid any franchise tax, which, it has been held, is but another name for intangible property. The only property upon which taxes were assessed and paid prior to that time was tangible property. It was discovered, not only in Kentucky but elsewhere, that in addition to their tangible property many corporations, because of the use of such property in the manner permitted by the sovereignty creating it or under whose permission it operated locally outside of the State of their creation, increased the total value of their property largely in excess of their tangible property, which excess grew out of the privileges conferred in the use of its tangible property, and such excess valuation is referred to in the books, sometimes as the corporations' franchise, but it is now come to be more generally designated as intangible property, and is universally regarded and held to be a legitimate subject of taxation. The class of corporations which the Statutes make liable for taxes on its intangible property are set forth in section 4077 of our Statutes, in this language: "Every railway company or corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company,, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and ecery other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised."

In order to enable the assessment board to properly value the franchise, or the intangible property subject to taxation in this State, section 4078 of our Statutes requires all corporations subject to the payment of the tax to file a report between the thirtieth day of June and the first day of October of each year with the Auditor of Public Accounts setting forthe the facts therein stated, and if the corporation is a common carrier with lines extending beyond the confines of this State, section 4079 requires the statement of additional facts in such reports among which are "the length of entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or [fol. 121] taxing district, and the entire line operated, controlled, leased or owned elsewhere." The latter section also required that the corporations referred to therein shall also report "the gross and net income or earning received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made." The two following sections, 4080 and 4081, furnish formulas to guide the assessing board in arriving at the true value of the intangible property subject to taxation in this State. Since the enactment of the sections referred to, all corporations coming within their purview have made the required reports to the Auditor of Public Accounts and have been assessed and have paid the taxes on the due proportion of their intangible property, which, under the Statutes, has a taxable situs in this State; and it is admitted by the defendant that it it was doing business as a common carrier in this State it would be subject to the franchise tax provided by the sections of the statute or to the payment of taxes on its proportion of intangible property in Kentucky. But it insists that it did not make the report required by the Statute to the Auditor of Public Accounts, and that it is not liable for any franchise tax or taxes on any intangible property sought to be assessed because it does not now nor has it ever exercised "any special or exclusive privileges or franchise not allowed by law to natural persons" in Kentucky; that the only business which it does in Kentucky is to maintain an office for the purpose of soliciting freight and other business for its railroad system out of Kentucky, which is not the exercise of such a privilege as subjects it to the character of taxes sought to be recovered, and that the business which is performed in Kentucky, under the character of special privilege mentioned, is conducted solely by other corporations which are separate and distinct from it and wholly independent of it. The Commonwealth on the other hand insists that the conducting of the business in Kentucky by the other corporations referred to is in name only, and that in reality that business is conducted and the privilege to do so is exercised by the defendant alone through the nominal agency of the respective local or subsidiary corporations, and that defendant is liable for and should be required to assess and pay the taxes involved.

The first question therefore is one of fact, which requires for its determination a return to the answers of defendant to the interrogatories propounded to it and to the written stipulation agreed to and filed by the parties. To undertake to insert herein defendant's answers to the interrogatories, and the parts of the stipulation containing the decisive facts, would be an unnecessary consumption of time and space, and we will content ourselves by giving the substance of what is shown by them as constituting the facts.

The defendant was incorporated in Virginia on February 20, 1894, and acquired and operated a railway system in Virginia, and other places, until now it owns and operates in its name, in states outside of Kentucky, railroad lines aggregating more than nine thousand miles. In 1868 the Legislature of this State incorporated the "Louisville, [fol. 122] Harrodsburg and Virginia Railroad Company," which constructed and operated a part of the one hundred and twenty seven miles of line now ostensibly owned and operated by the "Southern Railway Company in Kentucky."

In 1884 the charter of the Louisville, Harrodsburg and Virginia Railroad Company was amended and the name of the company changed to "Louisville Southern Railroad Company," and it subsequently acquired some branch lines which had been constructed by other local railroad companies. In the meantime the Louisville Southern Railroad Company leased its line of railroad to other railroad companies and in July, 1893, it made default in the payment of interest on its bonded indebtedness, which resulted in a foreclosure proceeding in the Circuit Court of the United States for the District of Kentucky, in which there was a decree for the sale of its property, and at that sale a director of the defendant, Southern Railway Company, purchased the property which was paid for by the defendant and it, on August 17, 1894, caused the "Southern Railway Company in Kentucky" to be organized with defendant subscribing for all of the stock except a few shares held by its directors but only for the purpose of forming the corporation the stock being held by the individual stockholders in reality for the use and benefit of defendant, and the stock of the "Southern Railway Company in Kentucky" has continued to be held in the same manner since its organization.

At the time of the decretal sale of the properties of the Louisville Southern Railway Company, and at the time of the organization of and the takeing over of that property by the "Southern Railway Company in Kentucky," it acquired 769 cars of all kinds, and also 25 steam locomotives, which included its entire rolling stock; and since then whenever any such rolling stock became unfit for any cause it was supplied by the defendant, Southern Railway Company, at its own expense without any charge to the "Southern Railway Company in Kentucky." During all of the time the directors and officers of the two companies were the same individuals, but perhaps the "Southern Railway Company in Kentucky" did not have the number of directors that the defendant Southern Railway Company had, but the members of the directorate in the one company were also members of the directorate in the other. The receipts from the operation of the portion of the system operated in the name of the "Southern Railway Company in Kentucky" were and are sent directly to its treasurer in Washington, who is also the treasurer of the defendant company, since, as we have seen, each company has the same officers. The "Southern Railsay Company in Kentucky" in making its reports to the Interstate Commerce Commission stated each year that it was merged in the defendant Southern Railway Company, and the latter company made the same report and also stated in its annual reports to its stockholders covering the very years involved here that it owned the "Southern Railway Company in Kentucky." At all of the stations in Kentucky, along the lines of the latter company, are large signs or bulletin boards at its depots advertising the line as "The Southern [fol. 123] Railway System" and in all of the folders published and distributed by the defendant the trackage of the "Southern Railway Company in Kentucky" is shown to be a part of the Southern Railway System as much so as are any of the lines in Virginia or any other state in which it operates.

The same unifying facts are not shown wich reference to the other three companies involved, viz: The Cumberland Railroad Company, the Cumberland Railway Company and the Mobile and Ohio Railroad Company. In the latter company the defendant is shown to own a majority of the stock, and in this way it, in a sense, controls that company at least in the election of its directors and officers, many of whom are the same as those in the defendant company, but it is not shown that the earnings of that company are handled by the defendant to the extent and in the same manner as are those of the "Southern Railway Company in Kentucky" are handled; nor does it appear that the defendant furnishes to that company its depleted rolling stock either with or without charge to it. Many of the acts indicating complete ownership found to exist with reference to the "Southern Railway Company in Kentucky" are not shown with reference to the operation of the Mobile & Ohio lines. The Cumberland Railroad Company is a Tennessee corporation, and has a different set of officers from the defendant and while the latter may own a majority of its stock and control its policies, it is quite clear that there is not enough appearing in the record to destroy the separate identity of the two corporations, or to justify us in treating th*an* as unified in the single operation. The same may be said with reference to the Cumberland Railway Company, which, however operates only 1.74 miles of tract all of which is in Bell County in this State.

We will therefore devote the rema-nder of this opinion to a determination of the question whether the line of railway which is ostensibly operated by the "Southern Railway Company in Kentucky" is and has been actually and in legal contemplation owned and operated by the defendant, Southern Railway Company, so as to make it amenable to the payment of taxes in Kentucky on its intangible property in proportion that the length of that line bears to the length of the entire lines operated by it.

It is earnestly insisted by counsel for defendant that neither its ownership of a majority or even all of the stock in the "Southern Railway Company in Kentucky," nor the maintenance by it of an office in this State for the purpose of soliciting and routing freight and passengers to their destination, constitutes "doing business" in this State so as to render it liable for the taxes sought to be imposed, and in support of the stock ownership contention we are referred to the cases of Commonwealth v. Muir, 170 Ky. 435; Calor Oil and Gas Co. v. Franzell, 128 Ky., 715; City of Louisville v. McAteer, 26 Ky. L. R., 425; Bell, Sheriff v. City of Louisville, 106 S..W. (Ky.) 86; Conley v. Matheison Arkali Works, 190 U. S., 406, and Interstate Commerce Commission v. Stickney, 215 U. S., 98, and cases authorities referred to therein; and in support of the latter contention with reference to the maintenance of the office for the solicitation of freight and passengers, the cases of Green v. C. [fol. 124] B. & Q. Ry. Co., 205 U. S. 530 and Philadelphia & Reading Railroad Co. v. McKibben 243 U. S., 264, are cited. Both propositions are sound in the abstract as the cases cited fully demonstrate, and as is also shown in the taxt of Fletcher's Cyclopedia of Corporations, Vol. 9, pages 9985 and 10024 with numerous cases cited in the notes. Indeed, neither of the propositions are disputed by counsel for the Commonwealth, but the question involved here is not what constitutes "doing business," but rather who is it that is doing the business which is done by the "Southern Railway Company in Kentucky." If there were nothing else appearing in this case except what is contained in the two contentions just mentioned; there would be no difficulties in the way of affirming the judgments appealed from; but the problem before us is whether the facts as hereinbefore recited are sufficient, taken in connection with the ownership of the entire stock, to show that defendant is the real owner and operator and of course the controller, of the railroad lines in Kentucky, which purport to be owned, operated and controlled by the "Southern Railway Company in Kentucky."

Statutes enacted pursuant to the authority conferred by the Constitution for the purpose of imposing a general ad valorem tax will be construed according to the rules for interpreting other Statutes, i. e., so as to carry out the intention of the Legislature as gathered from the terms of the statute itself; and while a special tax Statute will not be construed so as to include property not intended by the

Legislature, as was held in the case of City of Maysville v. Maysville Street Railway Co., 128 Ky., 682; nor will a statute imposing a corporation organization tax be given a retroactive effect, without authority in the Statute to do so, so as to include corporations previously organized, as was held in the case of Crecelius v. Carrollton Savings and Loan Association, 167, Ky., 813; yet, "A statute imposing a tax upon a corporation will not be construed literally, it is *is* susceptible of any other reasonable construction, where a literal construction would enable the corporation to evade taxation, for statutes are always to be construed in accordance with the intention of the legislature, and it is not to be supposed that the Legislature intends that taxation shall be evaded." Fletcher's Cyclopedia of Corporations, page 7929.

It is insisted that the tax sought to be collected can only be imposed upon corporations, companies or associations "exercising any special or exclusive privilege or franchise not allowed by law to natural persons," and that the defendant, as owner of the stock of the "Southern Railway Company in Kentucky," is exercising only the same privilege that a natural person may exercise. If, however, the facts are that in addition to the ownership of such stock the defendant is in reality performing a public service in Kentucky by exercising the franchises and privileges of a common carrier in the name of another as agent only and to whom the Commonwealth has granted such franchises and privileges, it would be doing something more than a natural person would be authorized to do, and the question again recurs whether the defendant is in reality operating the line of the "Southern Railway Company in Kentucky" [fol. 125] in the manner indicated. It has been a guiding rule of courts from time immemorial to regard the substance rather than the shadow, and to determine questions according to appearances.

In the case of Southern Pacific Terminal Co. v. Interstate Commerce Commission, et al., 219 U. S., 498, the question was presented to the Supreme Court of the United States as to the identity of the Southern Pacific Railway Company with the appellant company, which was a local one operating in the city of Galveston, Texas. The facts are stated in the opinion and which we will consume neither the time nor the space to restate in this opinion, except to say that among the facts appearing was that of stock ownership in the local company by the Southern Pacific Company. The Supreme Court, in holding the facts sufficient to show a complete identification of the companies, said: "In opposition to these views appellants urge the legal individuality of the sifferent railroads and the Terminal Company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not con-erned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organised system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single."

A similar question was before the same court in the case of Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic and Commerce Association, 247 U. S., 490. In that case two trunk line railway companies, one of them designated in the opinion as the "Milwaukee Company" and the other one as the "Omaha Company," owned and operated lines of railroads running into the cities of Minneapolis and St. Paul, Minnesota. They organized a local company known as the Minneapolis Eastern Railway Company, which connected the termini of the two trunk lines in Minneapolis with the city of St. Paul and with certain milling interests therein. Under a contract with the three companies only three hundred (300) shares of the unauthorized capital stock of the local company were issued, and each of the trunk lines took seventy-five (75) shares, and five (5) were issued to qualifying directors of the local company, and one hundred and forty-five (145) were issued to a trustee for the "Eastern" or local company; but the superintendent, having charge of the operation of the local company could not be appointed without the consent of the two trunk lines. There were other facts showing the completeness of the control of the local company by the two owners of the trunk lines. In this suit it was charged that the local company was in reality owned by the two trunk line owners and it was sought to control switching charges made by the local company for freight hauled from one city to the other [fol. 126] and to their des-ination on the lines of the local company. After enumerating the facts, some of which we have not stated, the court said: "With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public."

Other illustrative cases are Colonial Trust Co. v. Montello Brick Works, 172 Fed., 310, and Cutler v. Cutler-Hammer Manufacturing Co., 266 Fed., 388. In those cases, as well as in 26 R. C. L., 164, the rule is announced that whether a corporation is "doing business", so as to render it amenable to the local law, is a question "which depends upon the facts of each particular case", and is necessarily not concluded by the mere fact of adopting a different name in which the particular business is transacted. The case of Peterson v. Chicago, Rock Island & Pacific Railway Co., 205 U. S., 364, strongly relied on, does not militate against that rule, since under the facts of that case it was determined that the companies involved were not identical, or unified, but continued to maintain their separate existence and also the independent operation of their respective properties.

In the case of Southern Railway Company in Kentucky v. Thomas, 28 Ky. L. R., 951, the question of the identity of the same two companies here involved was before this court and many of the facts appearing in this case appeared also in that one, and the court said: "Taking all the proof together, there was sufficient proof to warrant the jury in concluding that the Southern Ry. in Kentucky is simply one of the divisions of the Southern Ry. Co., and that although a different corporate name is used, it is the same thing as the Southern Ry. Co., the name only being changed by *by* adding the words 'in Kentucky'. In determining the liability of the corporation, the court will look at the substance, and not the mere form. (Davis Adm'r. v. C. & O. R. R. Co., 25 Ky. Law Rep., 342.)"

In addition to the foregoing authorities, our attention has been called to the two English cases of Apthorpe v. Peter Schoenhofen Co., 79 Law Times Rep., (N. S.) 98, and St. Louis Breweries v. Apthorpe, 79 Law Times Rep., (N. S.) 551. In those two cases an imposed income tax was sought to be collected from an English corporation which transacted none of the business in its name from which the company derived the income sought to be taxed, but the business was conducted in America, in the one case by an American corporation located in Chicago, Illinois, and in the other case by a similar corporation located and operated in the city of St. Louis, Missouri; but the English corporation owned the stock of the two American companies, elected their directors and otherwise controlled their active management, and to all intents and purposes the English [fol. 127] company was actually engaged in business in America, but in the name of the two American companies; and the courts held that the income was produced by business transacted by the English companies and sustained the tax. In the St. Louis Breweries case the court said: "What one looks at is not the words, but the substance. Now, there being to my mind this perfectly satisfactory ground on which to base the decision in this case. I do not propose to discuss the question whether the English company can be said to be carrying on the business of the American Company. All I would wish to observe is that in matters of this kind, especially in revenue matters, it seems to me that one ought to look at the substance, and not merely at matters of machinery and form; and there is a great deal to be said, I think, in favor of the larger view taken by the attorney general that, in effect and substantially, this English company is, through the American company, doing the business they do."

Another important fact that should not be overlooked is, that all of the cases in which the question was presented, including those relied on by defendant, the strongest of which perhaps is the Peterson case, supra, the court enters into a labored discussion and a detailed analysis of the facts in an effort to determine whether the different corporations involved were identical, or were in fact merges into one, when such discussion would be profitless and wholly unnecessary, if the mere fact of operating under a different name was determinative of the question. If separate nominal operation was alone decisive and labored discussion of the facts by the court in the respective cases was superfluous and a mere idle indulgence. We can not believe that such discussions were perfunctory only, but rather are we convinced that the court in each case was endeavoring to find the actual facts and to determine the question from them, and that the effort to ascertain the decisive facts was a determination by implication that they, when found, should prevail and govern the ultimate decision of the question, regardless of the nominal operation.

In the light of the foregoing authorities, and many others which could be cited, and looking at the proposition from a logical and common sense standpoint, we can not escape the conclusion that in each of the years involved defendant, Southern Railway Company, was the owner of and actually operated the lines of the "Southern Railway Company in Kentucky," not in its name but in that of the latter company, which latter fact was the shadow, but the actual operation was the substance. Defendant could not have more effectually operated these lines if it had done so in its own name. Every act looking to the control and management of them during the times mentioned was set in motion and actually executed by the same brains which conducted the operation of its admittedly owned lines, and the income from the Kentucky operation was sent to and presumably disbursed by the same officer who received and disbursed the income from the Southern Railway System proper. The defendant gave out to its stockholders and announced to [fol. 128] the travelling public that it owned the lines of the "Southern Railway Company in Kentucky," and to allow it to excape taxation on its just proportion of its intangible property subject to taxation in Kentucky, because of the mere shell or hull in whose name it was operating its Kentucky division, would not only be surrendering the substance to the shadow, but would demand of us that we shut our eyes to the facts, and to thus permit one, whom the statute was intended to reach, to escape taxation through the disguise produced by the figment of the Kentucky corporation, and to thereby enjoy in this Commonwealth special privileges not allowed to individuals without contributing its just proportion to the burdens of government. This is a practical age in which we live and facts are regarded more than fiction, and courts recognize things as they are and not as they appear when clothed in a disguised garb. It is our conclusion, therefore, that the court should have assessed against defendant Kentucky's portion of its intangible property assessed by the proportion of the mileage that the lines nominally operated by the "Southern Railway Company in Kentucky" bear to the entire mileage of defendant's system estimated according to the method provided by the statute.

But, it is insisted that this would result in taxing in Kentucky property having no situs here. A sufficient answer to this is that under the conclusions we have reached the result is the same as if the Kentucky division had been actually operated in the name of the defendant, the same as is the operation of the Illinois Central Railroad Company and other foreign common carriers who pay a similar tax under the same statute. The authorities are unanimous in holding that the intangible property subject to local taxation is not to be estimated alone according to the business done on that division of the railway system located within the taxing authority, but it is to be proportioned according to the business done over the entire system of which the local line or division is a part. Thus, in the case of Cleveland, etc. Ry. Co. v. Backus, 154 U. S., 439, it is said: The true value of a line of railroad is something more than an aggre-ation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed." See also Fletcher's Cyclopedia of Corporations, Vol. 7, pages 8067-8078, both inclusive, and the following cases from this court: Baltimore & Ohio Southwestern R. R. Co. v. Commonwealth, 177 Ky., 566; Bosworth, Auditor v. Evansville

& Bowling Green Packing Co., 178 Ky. 716; L. & N. R. R. Co. v. Commonwealth, 181 Ky., 193, and Bosworth v. Kentucky Highlands R. R. Co., 183 Ky., 749.

The Commonwealth in these cases recognizes the right [fol. 129] of the defendant to credit the amount of taxes which may be assessed herein by the amount of the taxes paid for the respective years on intangible property assessed by the "Southern Railway Company in Kentucky" which, according to our opinion, is all the relief growing out of that fact to which the defendant is entitled. And, of course, if Kentucky's proportion of the estimated intangible property of the defendant is not equal to or greater than the amount of intangible property assessed and tax paid by the Kentucky company, no judgment can be rendered against the defendant in either of the cases; otherwise the Commonwealth is entitled to have assessed the excess of the intangible property if any.

The proceedings are in the nature of a common law action but to be tried by the court without the intervention of a jury. The lower court did not reach the point of making an estimation of the intangible property to be taxed in Kentucky, since, as we have seen, the statements were dismissed upon the ground that the defendant was not liable in any event. We therefore have a case in which there is no adjudication upon the amount of property to be assessed by the court having original jurisdiction of the subject matter. The litigants have but lightly discussed the question as to the amount of the estimation to be made, nor are we fully aware that the case when submitted was prepared with that point in view. We have, therefore, concluded to remand the case to the Circuit Court with directions that it proceed to ascert the amount of intangible property which should be assessed for each of the years involved in Kentucky, according to the prevailing rule of law upon the subject.

Wherefore the judgment in each of the cases is reversed and remanded for proceedings not inconsistent with this opinion.

L. W. Morris, Frankfort, Ky.; Hazelrigg & Hazelrigg, Frankfort, Ky.; Hobson & Hobson, Frankfort, Ky.; for appellant.

Humphrey, Crawford & Middleton, Louisville, Ky.; Wallace & Harris, Versailles, Ky.; for appellee.

IN COURT OF APPEALS OF KENTUCKY

MOTION AND ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING—Nov. 29, 1921

Came the appellee by counsel and filed notice of intention to file a petition for rehearing.

And afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid, on the 13th day of December 1921, the following order was entered, to-wit:

[fol. 130] COMMONWEALTH

v.

SOUTHERN RAILWAY COMPANY

Woodford

COMMONWEALTH

v.

SOUTHERN RAILWAY COMPANY

Woodford

Came parties by Counsel and filed joint motion for 30 days time from December 16th, 1921, in which appellee may file petition for rehearing. Which motion is submitted.

The Court being sufficiently advised, it is considered that appellee's motion for 30 days from Dec. 16, 1921, to file petition for rehearing, be and the same is hereby sustained.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

MANDATE—Filed in Circuit Court Feb. 16, 1922

The Court being sufficiently advised, it seems to them the judgment in each of the above cases is erroneous.

It is therefore considered that the judgment in each case be reversed and cause remanded for proceedings not inconsistent with the opinion herein.

Which is ordered to be certified to said Court.
A Copy.
Attest:
Roy B. Speck, C. C. A., by Jeff Wood, D. C.

Issued February 9, 1922.

[fol. 131] [File endorsement omitted]

IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, Defendant,

and

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, &c., Defendants

SERVICE OF MANDATE—Filed Feb. 16, 1922

Notice is accepted that the plaintiff has filed the Mandate of the Court of Appeals in the above two causes in the Clerk's Office of the Woodford Circuit Court. February 9, 1922.

Humphrey, Crawford & Middleton, Wallace & Harris, Attorneys for Defendants.

[File endorsement omitted]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

ORDER FILING MANDATE—Feb. 27, 1922

On motion of the plaintiff in each of the two foregoing causes it is ordered that the Mandate from the Court of

Appeals and the Notice filed in the above styled causes during vacation and on the 16th day of February, 1922, be and they are each and all hereby noted of record.

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED ANSWER OF SOUTHERN RY. CO.—Filed May 20, 1922

The defendant, the Southern Railway Company, reiterates and reaffirms each and every allegation contained in its original answer hereto filed, and for amendment says:

That for the years referred to in the petition, that is, for each of the years ending June 30, 1914, June 30, 1915 [fol. 132] and June 30, 1916, it owned and operated a line of railroad extending from Washington, D. C., south into the States of Virginia, North Carolina, South Carolina, Tennessee, Georgia, Florida, Alabama and Mississippi; that it also owned and operated a line of road extending from New Albany, Indiana, to East St. Louis, Illinois, a distance of 264.99 miles; that the western terminus of the lines of the Southern Railway Company in Kentucky was for each of said years at Louisville, Kentucky; that the only connection between the western terminus of the Southern Railway Company in Kentucky and the line of this defendant extending from New Albany, Indiana to East St. Louis, Illinois, was over the tracks and bridge of the Kentucky & Illinois Terminal Railroad Company; that this defendant did not own, operate, lease or control the said Kentucky & Indiana Terminal Railroad Company, but only owned one-third of its capital stock.

That the main line of the Southern Railway Company in Kentucky was from Louisville to Danville, with branch lines extending from Harrodsburg to Burgin, from Lawrenceburg to Lexington, and from Versailles to Georgetown, all in the State of Kentucky, and that the total mileage of the said lines in Kentucky was 164.41 miles; that at each of said eastern terminals, to-wit at Georgetown, Lexington, Burgin and Danville, Kentucky, the lines of the Southern Railway Company in Kentucky connected only with the main line of the Cincinnati, New Orleans & Texas Pacific Railway Company extending from Cincinnati, Ohio to Chattanooga, Tennessee; that this defendant did not for any of said years own, operate, lease or control any line of railroad which ran into either Georgetown, Lexington, Burgin or Danville, Kentucky; that the nearest point to any of said places where this defendant did own, operate, lease or control a line of railway was Harriman Junction, Tennessee, on the line of the C. N. O. & T. P. Ry., and that said Harriman Junction was a distance of 141.8 miles south from Danville, Kentucky; that the only other point on the C. N. O. & T. P. Ry. Co. lines where this defendant owned, operated, leased or controlled any line of railroad was at Chattanooga, Tennesse, which place was 221.5 miles south from Danville, Kentucky.

This defendant did not for any of said years, either directly or indirectly, own, operate, lease or control the said Cincinnati, New Orleans & Texas Pacific Railway Company, but that said Company for each of said years was operated by its own management and entirely in its own interests; that the only arrangement for the years ending June 30, 1914, June 30, 1915, and June 30, 1916, under which the said C. N. O. & T. P. Ry. handled traffic between this defendant and the Southern Railway Company in Kentucky was the same arrangement as existed between any independent connecti-g carriers, that is, that the traffic was handled by the C. N. O. & T. P. Ry. on an established basis of division rates and fares as a connecting carrier and that such basis of division was negotiated by the traffic officers of the said C. N. O. & T. P. Ry. Co. with the traffic officers of this defendant; that for each of said years the said C. N. O. & T. P. Ry. Co. maintained an [fol. 133] independent traffic organization, both freight and passenger; that this independent traffic organization of the said C. N. O. & T. P. had complete control and charge of its rates, fares, divisions, routing and interchange with connections and shaped and controlled its policies solely in the interests of the said C. N. O. & T. P. Ry. Co.; that the traffic affairs of the said C. N. O. & T. P. Ry. Co. were as separate and distinct from those of this defendant or the Southern Railway in Kentucky and administered as independently thereof as are those of the Illinois Central, the Louisville & Nashville, or any other line; that the traffic department of the said C. N. O. & T. P. Ry. Co. published during each of said years its separate independent tariffs and maintained its separate independent soliciting organization; that its interchange policy was conducted with all of its connections in the manner that is customary between connecting and independent lines generally, its policy being determined by what was to the best interests of the said C. N. O. & T. P. Ry. Co. and without any reference to this defendant or the Southern Railway Company in Kentucky.

Defendant says that the Mobile & Ohio Railroad Company had a line of road extending from St. Louis, Missouri to Mobile, Alabama; that the said Mobile & Ohio Railroad Company was operated under its own management as an entirely independent line; that the said Mobile & Ohio Railroad Company maintained an independent freight and passenger traffic organization, and that this independent traffic organization of the said Mobile & Ohio Railroad Company during each of said years had complete charge and control of its rates, fares, divisions, routing and interchange with connections and shaped and controlled its traffic policies solely in the interests of the Mobile & Ohio and entirely independent of this defendant; that the traffic officers of the said Mobile & Ohio were as separate and distinct from those of this defendant and administered as independently thereof as were those of the Louisville & Nashville, the Illinois Central, or any other entirely independent railroad; that the traffic department of the Mobile & Ohio Railroad Company published its separate independent tariffs and maintained its own separate independent soliciting organization; that its interchange policy was entirely independent of any influence by the Southern Railway Company, and that for each of said years it conducted its interchange relations with its connections in the manner that is customary between connecting and independent lines generally, its policy being determined by what was to the best interests of the Mobile & Ohio and without reference to any relation of stock ownership or otherwise of this defendant.

Defendant says that its lines from New Albany, Indiana to East St. Louis, Illinois, together with the lines in Kentucky of the Southern Railway Company in Kentucky were not a part of the general system of this defendant, and that the said lines were entirely disconnected from, distinct from, and removed from any other lines of this defendant.

Defendant says that the net railway operating income for the year ending June 30, 1914 of its line from East St. [fol. 134] Louis, Illinois to New Albany, Indiana and the railway operating income of the Southern Railway Company in Kentucky were $596,940.69; that the hire of equipment and joint facility rents for both of said lines for said period was $300,022.34; that the mileage of the Southern Railway Company in Kentucky including trackage rights was 164.41 for said period, and that the mileage of this defendant in Indiana including trackage rights was 239.50 for said period, and that the mileage of this defendant in Illinois including trackage rights was 162.89 for said period:

That the railway operating income for said lines for the year ending June 30, 1915 was $444,672.64; that the hire of equipment and joint facility rents for both of said lines for said period was $318,718.93; and that for said period the mileage of the Southern Railway Company in Kentucky including trackage rights was 164.41, and that the mileage of this defendant in Indiana including trackage rights was 239.50 for said period, and that the mileage of this defendant in Illinois including trackage rights was 162.89 for said period:

That the railway operating income for said lines for the year ending June 30, 1916 was $990,405.26; that the hire of equipment and joint facility rents for both of said lines for said period was $305,123.42, and that for said period the mileage of the Southern Railway Company in Kentucky including trackage rights was 164.64, and that the mileage of this defendant in Indiana including trackage rights was 239.19 for said period, and that the mileage of this defendant in Illinois including trackage rights was 162.89:

That the proportion of the mileage in Kentucky to the mileage in Illinois and Indiana for the year 1914 was 29.%; that the proportion for the year ending 1915 was 29.%; and that the proportion for the year ending June 30, 1915 was 29.05%.

Defendant says that on account of the facts pleaded herein and facts pleaded in its original answer it would be a violation of the constitution of the State of Kentucky, and of the constitution of the United States, particularly the Fourteenth Amendment thereof, to assess against this defendant any franchise tax for any of the years stated in the petition, and that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation property not in Kentucky and values appertaining to property not in Kentucky and earnings derived from property not in Kentucky, and to do so would be a violation of the constitution of the State of Kentucky; and the constitution of the United States, particularly the Fourteenth Amendment thereof.

Wherefore, defendants pray- as in its original answer.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 135] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

REPLY TO AMENDED ANSWER—Filed May 20, 1922

Comes the plaintiff, Commonwealth of Kentucky, by &c. and for reply to the amended answer of defendant says that the Kentucky & Indiana Terminal Railroad Company is a mere city belt line consisting of a bridge over the Ohio River at Louisville, Kentucky with approaches thereto and certain switch lines in and around said Louisville, Kentucky. All traffic of defendant, which said defendant so desired, was moved by defendant over the tracks of said K. & I. under a contract for the payment of money by defendant to said K. & I. for the use of said trackage, and was so moved by defendant using defendant's own engined, and cars and on defendant's own schedules. Other railroads used said K. & I. tracks on like terms. Said K. & I. owned no rolling stock, except certain switch engines, and operated no trains; and said bridge, approaches and switch lines were used only as above stated.

Plaintiff says that defendant thus operated a continuous line of railway from Kentucky to East St. Louis, Missouri, and at said East St. Louis, defendant connected physically through a like city terminal belt line with the Mobile & Ohio Railroad Company, which said M. & O. connected physically with defendant's line at several points in Alabama and Mississippi. All traffic to and from said defendant's line in Kentucky, Indiana and Illinois was routed by defendant by way of said M. & O. or by way of said C. N. O. & T. P. as defendant found more expedient or more profitable to it.

All connecting carriers are required by law to interchange traffic and to carry traffic delivered to them by another connecting line. Defendant routed all of its said traffic over said M. & O. or C. N. O. & T. P., as might be to its own advantage in so doing, and had power to and did direct said traffic.

Plaintiff says that defendant's lines from New Albany, Indiana, to East St. Louis, Missouri, together with the lines in Kentucky of the Southern Railway in Kentucky were a part of the general system of the defendant. It denies that said lines or either of them were disconnected from, or distinct from, or removed from any other lines of defendant.

Plaintiff denies that at any time named in the statement the traffic affairs of the C. N. O. & T. P. R. Co., or the Mobile & Ohio R. Co., were as separate and distinct from those of the defendant or administered as independently thereof as are those of the Illinois Central or the Louisville and Nashville or any other line, or that the policy was determined alone by what was to the best interests of said C. N. O. & T. P. R. Co., or Mobile & Ohio R. Co., or without any reference to the defendant or the Southern Railway Company in Kentucky.

Plaintiff says that at all times mentioned in said statement, the defendant owned and controlled the majority of [fol. 136] the capital stock of the Mobile & Ohio Railroad Company and by virtue of such stock ownership controlled and operated said line by agents and servants so selected and controlled by them.

Wherefore, plaintiff prays as in its original statement.

W. D. Jesse, L. W. Morris, Hazelrigg & Hazelrigg,
Hobson & Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

ADDITIONAL STIPULATIONS OF FACTS—Filed May 20, 1922

In view of the defendant's Amended answer, the parties hereto by their respective counsel hereby stipulate the following facts as applicable to this case for the purpose of a trial in the Circuit Court, in addition to the stipulations filed heretofore.

1. The Kentucky & Indiana Terminal Railroad Company is a line owning and operating over eight miles of double main track, or sixteen miles of main track, and in addition has twelve miles of industrial track and thirty-six miles of track in its yards. It has extensive shops in Louisville, Kentucky, valued at over $700,000.00 and at which it employs three hundred and sixty-six men. It has 19 engines and there are more than 200 manufacturing or industrial concerns located entirely on its tracks. It serves these industrials by carrying cars to and from them regardless of the point of origin or the point of destination of such cars. The main track of the Kentucky & Indiana Terminal Railroad Company is used by the Southern Railway Company in Kentucky in the operation of its freight and passenger trains to and from Louisville; such tracins being operated by the engines of the Southern Railway Company in Kentucky and by that Company's train chess, but subject to the orders of the dispatchers of the Kentucky & Indiana Terminal Railroad Company. The Kentucky & Indiana Terminal Railroad Company also owns and maintains a bridge across the Ohio River, which bridge is also used by the Southern Railway Company in the manner heretofore detailed with regard to the Southern Railway Company in Kentucky. The main line of the Kentucky & Indiana Terminal Railroad Company is used by other railroads in the same way that it is used by the defendant, or by the Southern Railway Company of Kentucky. This use by the Kentucky & Indiana Terminal Railroad Company and by the defendant, the Southern Railway Company in Kentucky, is under a contract between the two companies which contract is similar to the contract which the Kentucky & Indiana Terminal Railroad Company has with various other roads.

[fol. 137] The Kentucky & Indiana Terminal Railroad Company owns no cars or rolling stock except engines. It is a terminal company that is used by a number of railroads doing business in Louisville. The capital stock of the said Kentucky & Indiana Terminal Railroad Company is owned equally by the defendant and the Baltimore & Ohio Southwestern Railroad Company and the Chicago, Indianapolis & Louisville Railway Company. All thereof said equally owning companies use the tracks of the Terminal Company.

a. At East St. Louis, Missouri, there is a terminal railroad company which connects with all of the railroads entering East St. Louis. There is no other connection between the lines of the Southern Railway Company at East St. Louis and the lines of the Mobile & Ohio at East St. Louis. The operation of the Terminal Company at East St. Louis is practically the same as the operation of the Kentucky & Indiana Terminal Company except that the engines of the Terminal Company are used in carrying the trains over the Terminal Company's tracks.

3. The lines of the Mobile & Ohio Railroad Company and of the Southern Railway Company connect at Corinth, Mississippi, and at Mobile, Blocton, Mapleville and Birmingham, Alabama.

4. The Mobile & Ohio Railroad Company and the Southern Railway Company are competitors for the business from St. Louis and the west, south, in that each of said roads keep independent traffic and soliciting offices each of which solicits for its own road, and independent of each other, business going south. The Mobile & Ohio gives to the competitors of the Southern Railway Company more business than it gives to the Southern Railway Company. The Southern Railway Company on business from the St. Louis and Louisville lines transports the said business the longest possible distance over its said lines and wherever possible, carries the same to Danville, Kentucky, and delivers it to the Cincinnati, New Orleans and Texas Pacific Railway Company.

All railroads haul traffic delivered to them the longest possible distance over their own lines.

5. Former Stipulation No. 21 is erroneous to the extent that it states that on the stations and bulletin boards of

the Southern Railway Company of Kentucky and on its office buildings there were the signs "Southern Railway System."

The words "Southern Railway System" were not used prior to February, 1917. At the stations and on the tickets of the Southern Railway Company in Kentucky, there was a capital S and R with an arrow through them. These same letters and signs appeared on the tickets and stations of the Southern Railway Company.

6. Freight and passengers going north from points south on the Southern Railway to Louisville or other Kentucky points, which were routed over the C. N. O. & T. P. rail- [fol. 138] road were carried on the Southern to the junction with the C. N. O. & T. P., then by the C. N. O. & T. P. to Danville, and then by the Southern Railway Company in Kentucky to the destination; and in the same way, freight and passengers going south from Louisville and the Kentucky points, which were routed over the C. N. O. & T. P. were carried to points on the Southern in the South. Through freight bills of lading and through passenger tickets were issued and the proceeds were divided according to mileage.

In the same way like business between Louisville and St. Louis going south from St. Louis which was routed over the M. & O. was carried by the M. & O. to some junction of the M. & O. with the Southern, and business going north from the Southern to these points which was routed over the M. & O. was done in the same way.

Through bills of lading and through passenger tickets may be bought on all connecting railroads and the proceeds are divided according to mileage.

7. Through passenger trains were run from St. Louis, Missouri to Danville, Kentucky, but no further. Pullman sleeping cars from St. Louis or Louisville to points south were hauled from Danville, south on the trains of the C. N. O. & T. P. Railway Company. Practically all railroads operated sleeping cars from points on their lines to points of entirely independent Connecting railroads.

8. The defendant for each of the years involved owned the majority of the capital stock of the Mobile & Ohio Railroad Company and elected its Board of Directors. All of

the officers of the said Mobile & Ohio Railroad were elected by the said Board of Directors.

9. It is further stipulated that plaintiff read on the trial the printed maps contained in the various stockholders' reports filed.

10. Former stipulations No. 12 and 13 are erroneous. But, it is true that the Southern Railway Company of Virginia owned terminals, shops, double tracks outside the State of Kentucky which constituted an excess valuation, for 1914, $43,699,232.53; for 1915, $49,639,400.79; for 1916, $55,260,111.19.

These figures include $5,982,972, the outside excess value of the Mobile & Ohio Railroad Company for each of the years.

Humphrey, Crawford & Middleton, Wallace & Harriss, for Defendants. Jesse & Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for Plaintiffs.

It is agreed that the traffic manager of the C. N. O. & T. P. R. Co. and the Mobile & Ohio R. Co. will state that the traffic affairs of said C. N. O. & T. P. R. Co. and Mobile & Ohio R. Company were as separate and distinct from those of this defendant and administered as independently thereof as those of the I. C. R. Co. or the L. & N. R. R. Co. or any other line and its policy was determined alone by [fol. 139] what was to the best interest of the C. N. O. & T. P. R. Co. or Mobile & Ohio R. Co.

Hazelrigg & Hazelrigg, Hobson & Hobson, W. D. Jesse, L. W. Morris, for Plaintiff. Humphrey, Crawford & Middleton, Wallace and Harris, for defendants.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

STIPULATION THAT CASES BE HEARD TOGETHER—Filed May 20, 1922

The parties hereto by counsel, stipulate that the above cases may be heard together before Judge Charles C. Marshall of the Shelby Circuit Court at Shelbyville, Kentucky, on June 28, 1922.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendant. W. D. Jesse, L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED ANSWER OF SOUTHERN RY. CO. & JAMES C. DAVIS—Filed May 20, 1922

The defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, acting as Agent under Section 206 of the Transportation Act of 1920, reiterate and reaffirm each and every allegation contained in their original answer, and for amendment say:

That in January, 1917, the defendant, Southern Railway Company controlled the Alabama Great Southern Railroad Company through ownership of a majority of its capital stock; that in January, 1917, the defendant Southern Railway Company and the Alabama Great Southern Railroad Company acquired a majority of the capital stock so that the defendant Southern Railway Company could and did control through stock ownership the Cincinnati, New Orleans and Texas Pacific Railway Company from January, 1917, to the present time.

[fol. 140] Defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, say that for the year ending June 30, 1917, the railway operating income of this defendant and the lines owned, operated, leased and controlled by the defendant and by the C. N. O. & T. P. Ry. Co. was $36,776,734.50; that the proportion of the mileage in Kentucky of the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition herein and including the mileage in Kentucky of the C. N. O. & T. P. Ry. Co. to the total mileage of the lines owned, operated, leased and controlled by the defendants including the mileage of the C. N. O. & T. P. Ry. Co. was 4.209 per cent; that for the said period the defendant Southern Railway Company had on its lines outside of Kentucky double tracks, shops, terminals, etc., of the value of $67,832,331.71; that none of the lines in Kentucky of any of the roads referred to in plaintiff's complaint had any such double tracks, shops, or terminals. The Cincinnati, New Orleans & Texas Pacific Railway Company had outside of Kentucky double tracks, shops and terminals of the excess value of $1,019,582.15 over and above any double tracks, shops or terminals which it had inside of the State of Kentucky. Defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, say that for the year ending June 30, 1917 the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition, including the Cincinnati, New Orleans & Texas Pacific Railway Company or the Officers of the Director General of Railroads, filed with the Kentucky State Railroad Commission, the State Board of Valuation and Assessment, and the State Tax Commission of Kentucky full reports showing the result of all the operations of each of said lines of road as required by statute and each company or the officers of the Director General of Railroads paid the full tax assessed on its tangible and intangible property; that for said period the C. N. O. & T. P. Ry. Co. paid to the State of Kentucky a franchise tax on a franchise valuation of $9,181,368.00, and that the other railroads in Kentucky mentioned in the petition paid taxes on a franchise valuation of $3,500,053.00.

Defendants, Southern Railway Company and James C. Davis, Director General of Railroads, and each of them say that for the year ending Dec. 31, 1918, the railway operating income of this defendant and of the C. N. O. & T. P. Ry. Co. was $36,017,327.13; that the proportion of the mileage in Kentucky of the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition herein and including the mileage in Kentucky of the C. N. O. & T. P. Ry. Co. to the total mileage of the lines owned, operated, leased and controlled by the defendants including the mileage of the C. N. O. & T. P. Ry. Co. was

4.273 per cent; that for the said period the defendant, Southern Railway Company had on its lines outside of Kentucky double tracks, shops, terminals, etc., of the value of $8,160,065.06; that none of the roads mentioned in the plaintiff's petition in Kentucky had any such double tracks, shops, terminals etc. The Cincinnati, New Orleans & Texas [fol. 141] Pacific Railway Company had outside of Kentucky double tracks, shops, Terminals, etc. of the excess value of $2,046,735.53 over and above the value of any double tracks, shops or terminals inside of the State of Kentucky.

Defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, say that for the year ending December 31, 1918, the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition, including the Cincinnati, New Orleans & Texas Pacific Railway Company or the officers of the Director General of Railroads, filed with the Kentucky State Railroad Commission, the State Board of Valuation and Assessment, and the State Tax Commission of Kentucky full reports showing the result of all the operations of each of said lines of road as required by statute and each company or the officers of the Director General of Railroads paid the full tax assessed on its tangible and intangible property; that for said period the said C. N. O. & T. P. Ry. Co. paid to the State of Kentucky a franchise tax on a franchise valuation of $9,173,208,00, and that the other roads in Kentucky mentioned in the petition paid taxes on a franchise valuation of $3,500,512.00.

Defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, say that on account of the facts pleaded herein and the facts pleaded in their original answer it would be a violation of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment thereof, to assess against this defendant any franchise tax for any of the years stated in the petition, and that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation property not in Kentucky and values appertaining to property not in Kentucky and earnings derived from property not in Kentucky and that to do so would be a violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the Fourteenth Amendment thereof.

Wherefore, defendants Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, pray as in their original answer.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendants.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

REPLY TO AMENDED ANSWER—Filed May 20, 1922

Comes the plaintiff, Commonwealth of Kentucky, By &c. and for amendment to its original reply says that the said [fol. 142] State Tax Commission made all railroad assessments for the year 1918 on the reports filed as of June 30, 1917, and for said year 1918 said commission equalized all assessments, including all railroad assessments at 75%. Said State Tax Commission made all railroad assessments for the year 1919 on the reports filed as of December 31, 1918; and for said year 1919, said commission equalized all assessments, including railroad assessments, at 85%. Plaintiff denies that any assessment was equalized at 70% for either of two years named in its statement.

For reply to defendant's amended answer, plaintiff admits that said C. N. O. & T. P. Ry. Co. was a part of the general system of defendant for said two years and was operated as alleged. Admits that the Southern Railway in Kentucky, and other railroads in Kentucky mentioned in the petition, including the Cincinnati, New Orleans & Texas Pacific Railway Company, or the officers of the Director General of Railroads filed with Kentucky State Railroad Commission, the State Board of Valuation & Assessment, and the State Tax Commission of Kentucky reports for the year ending June 30, 1917, denies that said reports or any of them, were full reports, or showed the result of any or all operations or operations of each or any or all of said lines as required by statute. Admits that the Southern Railway in Kentucky, and other railroads in Kentucky mentioned in the petition, including the said C. N. O. & T. P. or the officers of the Director General of Railroads filed with the Kentucky State Railroad Commission, the State Board of Valuation & Assessment, and the State Tax Commission of Kentucky reports for the year ending December 31, 1918; denies that said reports or any of them, were full reports, or showed the result of any or all operations or operation of each or any or all of said lines as required by statute.

Plaintiff denies that on account of the facts or fact pleaded by defendants in their original answer, or for other reason, it would be a violation of the Constitution of Kentucky, or of the Constitution of the United States, or of any amendment thereof to assess against this defendant a franchise tax for either or any of the years stated. Plaintiff denies that the effort made herein is simply, or at all, for the purpose of endeavoring to bring into the State of Kentucky for the purpose of taxation, property not in the State of Kentucky or value or values appertaining to property not in Kentucky, or earning or earnings derived from property not in Kentucky. Denies that to do so would be a violation of the Constitution of the State of Kentucky, or the Constitution of the United States, or of any amendment thereof.

Wherefore, plaintiff pleads as in its original statement.

W. D. Jesse, L. W. Morris, Hazelrigg & Hazelrigg,
Hobson & Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 143] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

ADDITIONAL STIPULATION OF FACTS—Filed May 20, 1922

In view of the defendant's amended answer, the parties hereto, by their respective counsel hereby stipulate the following facts as applicable to this case for the purpose of a trial in the Circuit Court, in addition to the Stipulations filed heretofore.

1. Effective January, 1917, the executive and other officers of the defendant, Southern Railway Company, became the corresponding officers of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since January, 1917, there has been unification and consolidation for supervision of operation of the said Cincinnati, New Orleans & Texas Pacific Railway Company into the Southern Railway System. Since January, 1917, the cars and engines of the Cincinnati, New Orleans & Texas Pacific Railway Company have been marked "Southern," and at all of the stations of the Cincinnati, New Orleans & Texas Pacific Railway Company, the bulletin boards had on them "Southern Railway System," and on the caps and uniforms of the conductors there was the word "Southern."

2. The Cincinnati, New Orleans & Texas Pacific Railway Company owns and operates a line of railroad in the State of Kentucky 197.50 miles long. It passes through the following counties and has the following mileage in each:

Kenton County	14.37	miles
Boone County	9.13	"
Grant County	22.45	"
Harrison County	2.43	"
Scott County	22.21	"
Fayette County	13.88	"
Jessamine County	15.94	"
Mercer County	8.14	"
Boyle County	10.42	"
Lincoln County	23.83	"
Pulaski County	30.99	"
McCreary County	23.71	"
	197.50	miles

It also owned excess outside valuation as follows: for 1917, $1,019,582.15; for 1918, $2,046,735.53. Its net railway operating income was as pleaded in said amended answer. Its total mileage for 1917 and 1918 was 337.27 miles both in and outside this state, and this sum is to be added to the total mileage of defendant.

[fol. 144] For each year it reported to the State Tax Commission in its own name and was so taxed on the basis of the assessments set out in the amended answer.

The defendant has owned and controlled the said C. N. O. & T. P. to the extent and as set out above and in its amended answer and former stipulation No. 5 is modified to the extent above indicated.

The C. N. O. & T. P. connected physically with the Southern Railway Company in Kentucky at Georgetown, Kentucky, Danville, Kentucky, Burgin, Kentucky, and Lexington, Kentucky.

3. It is further stipulated that plaintiff read on the trial the printed maps contained in the various stockholders' reports filed.

4. Former Stipulation No. 12 is erroneous. But it is true that the Southern Railway Company of Virginia owned terminals, shops, double tracks outside the state of Kentucky which constituted an excess valuation, for 1917, $80,160,065.06; for 1918, $81,845,408.72.

5. Former Stipulation No. 19 is erroneous. But it is true that for the year 1917 the property of all railroads in the State of Kentucky was equalized at 75% and for 1918 85%.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendant. W. D. Jess, L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS, Sheriff of Woodford County, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendants,

and

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS, Sheriff of Woodford County, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY and JAMES C. DAVIS, Director General, Defendants

SUBSTITUTED JUDGMENT—May 20, 1922

Pursuant to the mandate of the Court of Appeals, heretofore filed, the judgment entered in each of the above actions is now set aside and the cases are restored to the docket.

[fol. 145] It appearing that the term of Robert Hawkins as Sheriff of Woodford County, has expired and that Frank Bohannon, is now Sheriff of Woodford County, on his motion, said Frank Bohannon, as Sheriff of Woodford County is now substituted for said Robert Hawkins, as relator herein.

Hon. Robert L. Stout, the regular Judge of this court being unable to preside herein by consent of parties, these actions are submitted to Hon. Charles C. Marshall as Special Circuit Judge.

Came defendants in each of the above cases and tendered and moved to file amended answer to the filing of which plaintiff objected; the objection was overruled and the amended answer filed to which plaintiff excepted.

Came plaintiff in each case and filed reply to the amended answer and by consent the affirmative matter in said reply stands controverted of record.

Came parties and filed additional stipulations and the actions are submitted thereon and on the stipulations heretofore filed in this court and on the pleadings and exhibits for final judgment.

The court being sufficiently advised it is now adjudged that for the fiscal year beginning July 1, 1914, a part of the franchise of the defendant, the Southern Railway Company was omitted from assessment and that the part so omitted was of value Nine Hundred and Seventy-two Thousand, Six Hundred and Sixty-two ($972,662.00) Dollars and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1915. Said assessment is at the rate of Seven Thousand Six Hundred and Sixty-nine Dollars and seventy-five ($7,669.75) cents per mile. County taxation will be in the following counties on the basis of the mileage therein as below set out:

Jefferson County	21.387	miles
Shelby County	24.299	"
Anderson County	20.092	"
Mercer County	22.049	"
Boyle County	2.000	"
Woodford County	21.185	"
Fayette County	8.206	"
Scott County	7.600	"

It is further adjudged that for the fiscal year beginning July 1, 1915, no part of the franchise of said defendant was omitted from assessment and that plaintiff take nothing by the petition for that year.

It is further adjudged by the Court, that for the fiscal year beginning July 1, 1916, a part of the franchise of the said Southern Railway Company was omitted from assessment and that the part so omitted was of value, two million eighteen thousand five hundred and sixty-one dollars, ($2,018,561.00) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1917. Said assessment is at the rate of Fifteen Thousand [fol. 146] Nine Hundred and Sixteen Dollars and ninety-nine ($15,916.99) cents per mile. County taxation for said year will be in the Counties and on the basis of the mileage for the fiscal year beginning July 1, 1914 above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on July 1, 1914 and July, 1, 1916, the said defendant shall pay a penalty of twenty per cent on the amount of said State and County Taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

It is further adjudged by the Court that for the fiscal year beginning July 1, 1917 a part of the franchise of said Southern Railway Company was omitted from assessment and that the part so omitted from assessment was of value one million seven hundred and thirty thousand and ninety dollars ($1,730,090) and it hereby — assessed at said sum for State and County taxation for said fiscal year ending June 30, 1918.

Said assessment is at the rate of Five Thousand Three Hundred and Thirty-four Dollars and fifty-five cents ($5,334.55) per mile. County taxation will be in the following counties on the vasis of the mileage therein as below set out:

Jefferson County	21.387	miles
Shelby County	24.299	"
Anderson County	20.092	"
Woodford County	21.185	"
Kenton	14.37	"
Boone County	9.13	"
Grant County	22.45	"
Harrison County	2.43	"
Scott County	29.81	"
Fayette County	22.086	"
Jessamine County	15.94	"
Mercer County	30.189	"
Boyle County	12.42	"
Lincoln County	23.83	"
Pulaski County	30.99	"
McCreary County	23.71	"

It is further adjudged by the Court that for the fiscal year beginning July 1, 1918, a part of the franchise of said Southern Railway Company was omitted from assessment and that the part so omitted was of value Three Million and Twenty-eight Thousand Five Hundred and Ninety-two ($3,028,592.00) Dollars and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1919.

Said assessment is at the rate of Nine Thousand Three Hundred and Thirty-eight dollars and thirty-four ($9,-

338.34) cents per mile. County taxation for said fiscal year will be in the counties and on the basis of the mileage therein for the fiscal year beginning July 1, 1917 above set out.

[fol. 147] It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on July 1, 1917 and July 1, 1918, the defendants Southern Railway Company and John C. Davis, Director General of Railroads, shall pay a penalty of twenty-per cent on the amount of said State and County taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

As compensation for his services, Frank Bohannon, as Sheriff of Woodford County, the relator herein, is adjudged in both cases entitled to seventy-five per cent of the twenty-per cent penalty herein before adjudged to be paid on said State and County taxes. Said defendants shall pay the total twenty per cent penalty on all State and County taxes to the Auditor of Public Accounts and said Auditor shall pay seventy-five per cent thereof to said relator Frank Bohannon.

W. D. Jesse as County attorney of Woodford County, was present and assisted in the trial of these proceedings and he is allowed in both cases as compensation for his services fifteen per cent of the amount of said State and County taxes. Said fifteen per cent of the State taxes shall be paid to him by the Auditor when said taxes are paid. Said fifteen per cent of County taxes shall be paid to him by the Sheriff of the respective Counties when he collects said taxes and the remaining eighty-five per cent, shall be paid by the Sheriff to the County.

It is further adjudged that the Clerk of the Woodford County Court shall enter in the book kept by him for that purpose this Judgment, and he shall certify the assessment hereby made by the Court of the part of said franchise omitted as aforesaid and its value, as herein fixed, to the Auditor of Public Accounts, and the apportionment thereof, to the County Clerk, and the Sheriff of each of the Counties above named.

It is further adjudged that in each of these actions the plaintiff recovers his costs and may have execution, etc.

To all of which in each case, the defendants except and pray an appeal to the Court of Appeals which is granted.

This judgment is substituted for the judgment heretofore entered.

Chas. Marshall, Special Judge Woodford Circuit Court.

Have seen and may be substituted for original judgment.
Wallace & Harriss, Humphrey, Crawford & Middleton, 8/22/22; W. D. Jesse, Hazelrigg & Hazelrigg, L. W. Morris, Hobson & Hobson.

Bond on appeal approved and filed Aug., 1922, omitted in printing.

[fol. 148] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

SUPERSEDEAS—Filed Aug., 1922

I do certify that an appeal has been granted by the Woodford Circuit Court from a judgment rendered at its May Term, 1922, in favor of Commonwealth of Kentucky, on relation of Robert Hawkins, Sheriff of Woodford County, appellee, against Southern Railway Company and James C. Davis, Director General, appellants for:

"Pursuant to the mandate of the Court of Appeals, heretofore filed, the judgment entered in each of the above actions is now set aside and the cases are restored to the docket.

It appearing that the term of Robert Hawkins as Sheriff of Woodford County, has expired and that Frank Bohannon is now substituted for said Hawkins as relator herein.

Hon. Robert L. Stout, the regular Judge of this Court being unable to preside herein by consent of parties, these actions are submitted to Hon. Charles C. Marshall as Special Circuit Judge.

Came defendants in each of the above cases and tendered and moved to file amended answer to the filing of which plaintiff objected; the objection was ovverruled and the amended answer filed to which plaintiff excepted.

Came plaintiff in each case and filed Reply to Amended Answer and by consent the affirmative matter of said reply stands controverted of record.

Came parties and filed additional stipulations and the actions are submitted thereon and on the stipulations heretofore filed in this Court and on the pleadings and exhibits of final judgment.

The Court being sufficiently advised it is now adjudged that for the fiscal year beginning July 1, 1914, a part of the franchise of the defendant, the Southern Railway Company was omitted from assessment and that the part so omitted was of value Nine Hundred and Seventy-Two Thousand Six Hundred and Sixty-Two Dollars ($972,662) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1915. Said assessment is at the rate of Seven Thousand Six Hundred and Sixty-Nine and 75/100 Dollars ($7669.75) per mile.

County taxation will be in the following Counties on the basis of the mileage therein as below set out:

Jefferson County	21,387	miles
Shelby County	24,299	“
Anderson County	20,092	“
Mercer County	22,049	“
Boyle County	2,000	“
Woodford County	21,185	“
Fayette County	8,206	“
Scott County	7,600	“

[fol. 149] It is further adjudged that for the fiscal year beginning July 1, 1915, no part of the franchise of said defendant was omitted from assessment and that plaintiff take nothing by the petition for that year.

It is further adjudged by the Court, that for the fiscal year beginning July 1, 1916, a part of the franchise of the said Southern Railway Company was omitted from assessment and that the part so omitted was of value, Two Million Eighteen Thousand Five Hundred and Sixty-One Dollars ($2,018,561) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1917. Said assessment is at the rate of Fifteen Thousand Nine Hundred and Sixteen and 99/100 Dollars per mile. County taxation for said year will be in the Counties and on the basis of the mileage for the fiscal year beginning July 1, 1914 above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on July 1, 1914 and July 1, 1916, the said defendant shall pay a penalty of twenty per cent on the amount of said S-ate and County taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

It is further adjudged by the Court that for the fiscal year beginning July 1, 1917, a part of the franchise of said Southern Railway Company was omitted from assessment and that the part so omitted from assessment was of value One Million Seven Hundred and Thirty Thousand and Ninety Dolars ($1,730,090) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1918.

Said assessment is at the rate of Five Thousand Three Hundred and Thirty-four and 55/100 Dollars ($5,334.55) per mile.

County taxation will be in the following Counties on the basis of the mileage therein as below set out:

Jefferson County	21.387	miles
Shelby County	24.299	"
Anderson County	20.092	"
Woodford County	21.185	"
Kenton County	14.37	"
Boone County	9.13	"
Grant County	22.45	"
Harrison County	2.43	"
Scott County	29.81	"
Fayette County	22.086	"
Jessamine County	15.94	"
Mercer County	30.189	"
Boyle County	12.42	"
Lincoln County	23.83	"
Pulaski County	30.99	"
McCreary County	23.71	"

It is further adjudged by the Court that for the fiscal year beginning July 1, 1918, a part of the franchise of said [fol. 150] Southern Railway Company was omitted from assessment and that the part so omitted was of value Three Million and Twenty-eight Thousand Five Hundred and Ninety-Two Dollars ($3,028,592) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1919.

Said assessment is at the rate of Nine Thousand Three Hundred and Thirty-eight and 34/100 Dollars ($9,338.34) per mile.

County taxation for said fiscal year will be in the Counties and on the basis of the mileage therein for the fiscal year beginning July 1, 1917 above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on July 1, 1917 and July 1, 1918, the defendants Southern Railway Company and John C. Davis, Director General of Railroads, shall pay a penalty of twenty per cent on the amount of said State and County taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

As compensation for his services, Frank Bohannon, as Sheriff of Woodford County, the relator herein, is adjudged in both cases entitled to seventy-five per cent of the twenty per cent penalty herein before adjudged to be paid on said State and County taxes. Said defendants shall pay the total twenty per cent penalty on all State and County taxes to the Auditor of Public Accounts and said Auditor shall pay seventy-five per cent thereof to said relator Frank Bohannon.

W. D. Jesse as County Attorney of Woodford County was present and assisted in the trial of these procedings and he is allowed in both cases as compensation for his services, fifteen per cent of the amount of said State and County taxes. Said fifteen per cent of the State taxes shall be paid to him by the Auditor when said taxes are paid. Said fifteen per cent of the County taxes shall be paid to him by the Sheriff of the respective Counties when he collects said taxes and the remaining Eigthy-five per cent shall be paid by the Sheriff to the County.

It is further adjudged by the Court that the Clerk of the Woodford County Court shall enter in the Book kept by him for that purpose this judgment, and he shall certify the assessment hereby made by the Court of the part of said franchise omitted as aforesaid and its value, as herein fixed, to the Auditor of Public Accounts, and the apportionment thereof, to the County Clerk, and the Sheriff of each of the Counties above named.

It is further adjudged that in each of these actions the plaintiff recovers his costs and may have execution, etc.

To all of which in each case, the defendants except and pray an appeal to the Court of Appeals which is granted."

[fol. 151] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Aug., 1922

The Clerk will copy for the Court of Appeals the entire record in the two above cases since the return from the Court of Appeals including the Mandate of the Court of Appeals and notice of filing same.

He will make the Copy for the defendants and a carbon copy of it for the plaintiffs.

J. P. Hobson, Attorney for Plaintiff.

IN CIRCUIT COURT OF WOODFORD COUNTY

CLERK'S CERTIFICATE

I, C. A. Witt, Clerk of the Woodford Circuit Court do hereby certify that the foregoing 58 typewritten pages contain a true, accurate and complete copy of the entire record since the return of same from the Court of Appeals in the two cases of the Commonwealth of Kentucky By &c. vs. Southern Railway Company and Commonwealth of Kentucky By &c. vs. Southern Railway Company &c. as the same now appears of record and on file in the office of the Clerk of the Woodford Circuit Court, according to memoranda entered on Minute Book in the above styled cases.

Witness my hand as Clerk of the Woodford Circuit Court this the — day of August, 1922.

C. A. Witt, Clerk Woodford Circuit Court, by Annie W. Witt, D. C.

IN COURT OF APPEALS OF KENTUCKY

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, by FRANK BOHANNON,
Sheriff of Woodford County, Appellees,

and

SOUTHERN RAILWAY COMPANY and JAMES C. DAVIS, Director
General of Railroads, Appellants,

vs.

COMMONWEALTH OF KENTUCKY, by FRANK BOHANNON,
Sheriff of Woodford County, Appellees

STATEMENT ON APPEAL

The parties, appellant and appellee, are as above set out. The judgment appealed from was rendered at the May term of the Woodford Circuit Court, and is found on page [fol. 152] 38 of the transcript. The appeal was granted below and no process is necessary. The attorneys for the appellants are Ed Wallace, Versailles, Kentucky, and Humphrey, Crawford & Middleton, Louisville, Kentucky. The attorneys for the appellees are W. D. Jesse, Versailles, Kentucky, and L. W. Morris, Hazelrigg & Hazelrigg, and Hobson & Hobson, of Frankfort, Kentucky.

J. P. Hobson, for Appellee-.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

SUBMISSION OF MOTION TO HEAR CASES TOGETHER—Sept. 18, 1922

Came appellant by counsel, and filed brief and motion for oral argument. Came parties by counsel, and filed motion to hear these cases together, and to advance under Rule VI. Which motions are submitted.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER GRANTING MOTION TO HEAR CASES TOGETHER—Sept. 20, 1922

The Court being sufficiently advised, it is considered that appellee's motion to hear the above appeals together, and to submit and advance under Rule VI, be and the same is hereby sustained. It is further ordered that Appellant's motion for oral argument, be and the same is hereby overruled.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

JUDGMENT—June 13, 1924

The Court being sufficiently advised, it seems to them the judgment herein, is erroneous in part.

It is therefore considered that the judgment in the first case, in so far as it relates to the years 1914 and 1916 be reversed, and the judgment in the other case relating to 1917 and 1918, is affirmed. Which is ordered to be certified to said Court.

[fol. 153] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—Filed June 13, 1924

Judge CLARKE, reversing in the first and affirming in the second of these cases:

Upon former appeals of these cases, we held that "in each of the years involved, (1914-1918 inclusive), defendant Southern Railway Company, (a Virginia corporation), was the owner of and actually operated the lines of the 'Southern Railway Company in Kentucky,' " and as a consequence, the lower court "should have assessed against defendant Kentucky's portion of its intangible property" on the mileage basis, as provided by section 4081 Kentucky Statutes.

As there had been no attempt to make the assessments, the cases were remanded to the circuit court, with directions "that it proceed to ascertain the amount of intangible property which should be assessed for each of the years involved in Kentucky according to the prevailing rule of law upon the subject." Commonwealth v. Southern Railway Co., 193 Ky. 474, 237 S. W. 11.

Upon the return of the cases, the defendant filed amended answers, and upon stipulated facts, the court found that for 1915 Kentucky's portion of defendant's franchise had been fully assessed by and in the name of the Southern Railway Company in Kentucky, and that the value of its franchise employed in Kentucky not so assessed for each of the other years involved was as follows:

1914, $972,662; 1916, $2,018,561; 1917, $1,730,090;
1918, $3,028,592.

Judgments were entered accordingly, and the defendant has prosecuted an appeal in both cases, the first of which relates to the years 1914 and 1916, and the second to the years 1917-18, but it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by the former opinion herein, and the judgment in that case will therefore be affirmed without further discussion.

The grounds upon which we are urged to reverse the judgment in the other case relating to the years 1914 and 1916 are, that for those years there was no such unity of use and operation between defendant's line in Kentucky and its lines outside of the state as to permit the assessment of its franchise, as was done, upon the theory that all of its owned and controlled lines, in and out of the state, constituted a single system; that as a matter of fact its line in Kentucky for such years had neither physical nor operative connection with lines outside of the state, unless it be with its line running from New Albany, Ind. to East St. Louis, Ill., and that to apply the notion of organic unity to [fol. 154] all of its lines under such circumstances is violative of the Fourteenth Amendment of the Constitution of the United States, in that it brings into Kentucky for taxation purposes values wholly outside of the state. Whether or not this is true is the sole question presented for decision upon these appeals.

The first contention, upon which there is but little if any emphasis, is that defendant's line in Kentucky is not connected with its line from Louisville through Indiana and Illinois to St. Louis, because of the fact the latter enters Louisville from New Albany, Indiana, over tracks of the Kentucky & Indiana Terminal Railroad Company. It is stipulated, however, that the latter company is equally and jointly owned by the defendant and two other railroad companies using its tracks and other terminal facilities at Louisville, and that the defendant operates through trains under a single management from St. Louis, Missouri, through Louisville to Danville, Kentucky, and we are sure that there is not only such unity of use and control but also a sufficient physical unity, if that were required, as to warrant defendant's line from St. Louis to Danville, Ky., being regarded as a single unit, and that it would not be violative of the Fourteenth Amendment of the federal Constitution to assess its franchise in Kentucky upon the mileage basis, treating these lines in and out of Kentucky as a single system. L. & N. R. Co. v. Commonwealth, 181 Ky. 193, 204 S. W. 94; L. & N. R. Co. v. Greene, 244 U. S. 522; Pittsburgh v. Backus, 154 U. S. 431; Fargo v. Hart, 193 U. S. 499.

But according to our understanding of the record if this should be done and other lines owned by defendant excluded, the defendant has already, through the assessment made by and in the name of the Southern Railroad Company in Kentucky, assessed the full value of its franchise employed in the state for each of these two years, and the assessments fixed by the lower court can be sustained only if the 566 miles embraced in the St. Louis-Danville line are considered as a part of a system embracing also about 8,000 miles of lines owned, operated, leased, and controlled by the defendant, and extending from Washington, D. C., south through Virginia, the Carolinas, Tennessee, Georgia, Florida, Alabama, and Mississippi.

The question for decision then finally narrows to whether for the purpose of valuing defendant's franchise employed in Kentucky, the line from Danville, Kentucky, to St. Louis, Missouri, is to be considered as a separate unit or as a part of a system including also defendant's eastern and southern lines. For convenience we shall refer to the former as the Northern branch and the latter as the Southern branch of defendant's lines.

It is admitted that these two branches, for the years 1914 and 1916, had no physical connection with each other, unless it be through the Mobile & Ohio Railroad Company, of which the defendant ownes a majority of the capital stock, and which connects with defendant's Northern branch at East St. Louis, Ill., and with its Southern branch at Mobile, Ala. With reference to this company, there are the following stipulations in the record:

[fol. 155] "It is agreed that the traffic manager of the M. & O.—will state that the traffic affairs of the said M. & O.—were as separate and distinct from those of this defendant and asministered as independently thereof as those of the I. C. Railroad Company or the L. & N. Railroad Company or any other line, and its policy was determined alone by what was to the best interest of the said M. & O. Railway Company."

"The M. & O. gives to the competitors of the Southern Railway more business than it gives to the Southern Railway Company."

So that while it is true defendant owned the majority of the stock of the M. & O., it stands admitted that such stock control was not employed by the defendant to unite the M. & O. with other lines owned by it, and that for each of such years it was operated separately and independently from defendant's other two branches.

Defendant, in 1917, acquired the C. N. O. & T. P. Railway Co., and thus connected its Northern branch at Danville, Lexington, and Georgetown, Ky., with its Southern branch at Harriman and Chattanooga, Tenn., but for the years 1914 and 1916:

"It is agreed that the traffic manager of the C. N. O. & T. P. Ry. Co.—will state that the traffic affairs of the said C. N. O. & T. P. Ry. Co.—were as separate and distinct from those of this defendant and administered as independently thereof as those of the I. C. Railroad or the L. & N. Company or any other lines, and its policy was determined alone by what was to the best interest of the C. N. O. & T. P. R. R. Company."

As a result of these stipulations, it necessarily follows, it seems to us, that there was in fact no physical connection between the Northern branch and the Southern branch of the defendant's lines, and that despite the defendant's ownership and control of both of these separate branches, they cannot, under the many decisions of the Supreme Court of the United States, be considered as parts of a single system for the purpose of ascertaining the value of defendant's franchise employed in Kentucky without violating the Fourteenth Amendment of the federal Constitution.

As was stated in Wells Fargo v. Hart, supra; "The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction, although belonging to persons domiciled elsewhere, and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even through the other parts of the system are outside of the State."

But as a state can under no formula tax things wholly beyond its jurisdiction, it has always been recognized that the mileage system or apportionment for taxation can never [fol. 156] be used where special circumstances exist to distinguish between the conditions in and out of the taxing state, and so it has been held that terminal facilities and other property of unusual value, whose situs is capable of being localized, are not to be considered as parts of the apportionable entity. P. C. C. & St. L. v. Backus, 154 U. S. 421; I. C. R. R. Co. v. Green, 244 U. S. 555; Wallace v. Hines, 253 U. S. 66.

It also has been held that where the system basis is shown to be arbitrarily excessive, it cannot be adopted. Union Tank Line v. Wright, 249 U. S. 277.

It is true, as urged by counsel for appellant, that in all of the cases where this notion of organic unity has been applied to a railroad in assessing the value of its franchise in one of the several states to which its lines extend, the entire mileage has constituted a single continuous road, and in some of the cases that fact has been referred to, but we do not construe any of the cases to mean that it is necessary that there shall be physical continuity to warrant the application of the principle. Indeed in the case of Adams Express Co. v. Ohio, 165 U. S. 194, upon which appellee relies, the principle was applied where there was an absence of physical unity. It was there held:

"The unit is a unit of use and management," and after pointing out that the Express Company's tangible and separated property in Ohio "possessed a value in combination and from use in connection with" its property and capital located elsewhere, the court said:

"We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner but existing in the very necessities of the case—resulting from the very nature of the business."

So while that case disposes of the necessity of physical unity, it does not fit our case because although there was a unity of ownership and management of the two branches of defendant's lines, there was not such a unity of use as is above indicated there must be; and it is not perceivable how the property in Kentucky, or defendant's Northern branch of which it is a part, "possessed a value in combination and from use in connection with" the defendant's wholly disconnected Southern branch, until in 1917 when defendant acquired the C. N. O. & T. P. Ry. Co., and thus unified all of its holdings into a single unit of use and management.

The court, in Wallace v. Hines, supra, probably more clearly than elsewhere, has defined the limits of the permissible use of the organic unity system of assessment, as well as the reason therefor, as follows:

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system [fol. 157] to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.''

It therefore follows that, although our statute (4081) is broad enough to permit an assessment of defendant's franchise in Kentucky upon a mileage system of unity including all of its lines "owned, leased, or controlled in this state and elsewhere,'' it may not be so broadly applied, or except where "it can be seen in some plain and fairly intelligible way'' that its property elsewhere "adds to the values of the road and the rights exercised in the state,'' which is not true here.

Wherefore the judgment in the first case, in so far as it relates to the years 1914 and 1916, is reversed, and the judgment in the other case, relating to 1917 and 1918, is affirmed.

Humphrey, Crawford & Middleton, Louisville, Kentucky; Wallace & Harriss, Versailes, Ky., attorneys for appellant.

W. D. Jessee, Versailles, Ky., L. W. Morris, Frankfort, Ky.; Hazelrigg & Hazelrigg, Frankfort, Ky.; Hobson & Hobson, Frankfort, Ky., attorneys for appellee.

Afterwards at a Court of Appeals, held as aforesaid on the 1st day of July, 1924, the following order was entered, to-wit:

SOUTHERN RAILWAY CO.

v.

COMMONWEALTH, by, etc. (2 cases)

Woodford

Came parties by Counsel and filed joint motion that appellant be granted thirty days from July 1, 1924 to file a petition for rehearing. Which motion is submitted.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky, as aforesaid, the following order was entered:

[fol. 158]

SOUTHERN RAILWAY CO.

v.

COMMONWEALTH, by, etc.

Woodford

Came appellant by counsel and filed a petition for rehearing.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR REHEARING OR MODIFICATION OF OPINION

The Court may recollect that there were two cases, which were agreed, however, to be heard together. In one of them the Commonwealth asked an assessment against the Southern Railway Company for the fiscal years ending June 30, 1915, 1916 and 1917; and in the other asked an assessment against James C. Davis, Director General, and the Southern Railway Company, for the fiscal years ending June 30, 1918 and 1919. The original opinion in this case, reported Commonwealth of Kentucky v. Southern Railway Company, 193 Ky. 474, held that the Southern Railway Company, the Virginia corporation, in effect owned and operated the lines of the Southern Railway Company in Kentucky, and that the lines of the Southern Railway Company in Kentucky were part and parcel of the Southern Railway Company, the Virginia corporation, system. The judgment of the lower court which had dismissed the proceedings was reversed with directions to make an assessment based upon the above proposition, namely, that the Southern Railway Company, of Virginia, so owned and operated the lines of the Southern Railway Company in Kentucky as to make these lines a part of its system. In pursuance to the mandate an assessment was made by the lower court, and James C. Davis, Director General, and the Southern Railway Company, appealed, and these cases were heard together in this court. The result of the last opinion in this court is to hold that for the fiscal years 1915, 1916 and 1917 there could be no additional assessment based upon the proposition that the Southern Railway Company was a part of the Southern Railway Company, of Virginia's system, because as during these years the Southern Railway Company, the Virginia corporation, did not own or control, either directly or indirectly, a majority of stock in the C. N. O. & T. P. Railroad, there was no connection between the Southern Railway Company's Southern system and the lines from Danville, Kentucky, to St. Louis, Missouri, and the earnings from these lines did not justify any additional assessment. The judgment making an assessment for these years was therefore reversed with directions to dismiss that petition. But the Court affirmed the assessments made for the fiscal [fol. 159] years ending June 30, 1918, and June 30, 1919, against James C. Davis, Director General, and the Southern Railway Company, as during that period the Southern Railway Company did own or control a majority of stock in the C. N. O. & T. P. and therefore there was a connection between the system of the Southern Railway Company in the South and the Southern Railway Company in Kentucky, Indiana and Illinois.

We cannot, of course, attempt to reargue the principles laid down in the opinion reported in Commonwealth of Kentucky v. Southern Railway Company, 193 Ky. 474, as under a well-established rule of this Court this opinion became the law of the case. There are however, some matters, not settled by that opinion, and not settled by the new opinion, to which we desire to call attention:

(1) The judgment of the Court below made an assessment against James C. Davis, Director General and the Southern Railway Company for the fiscal years ending June 30, 1918 and 1919, these being the years in which the Director General had possession of the lines of the Southern Railway Company. This possession was pleaded in the original answer in that case, and a denial was made of any duty on the part of the Southern Railway to report for either of these years. We submit that this assessment should not have been made against the Southern Railway Company, but against James C. Davis, Director General, only, as there could have been no dereliction of duty upon the part of the Southern Railway Company in failing to report during the time when its property was in the hands

of the Director General, and the Southern Railway had no books or accounts showing what were the earnings and expenses. We therefore ask a modification of the opinion so as to direct that the case be reversed with directions to dismiss it so far as the Southern Railway Company, of Virginia is concerned. We believe this is settled by the cases of Commonwealth v. L. & N., 109 Ky. 309, and Rogers v. Hines, 193 Ky. 795. We will hereafter set out the statutes on this subject as relating specially to taxes in connection with another matter.

(2) The court below not only made an assessment for the fiscal years ending June 30, 1918, and June 30, 1919, against the Director General and the Southern Railway Company, but fixed a penalty to be paid by both of these defendants upon the taxes due under this assessment. We respectfully submit that so much of the judgment as affixed this penalty cannot stand, as not being embraced within a proper construction of the Federal statute relative to taxes during Government operation.

It may be remembered that possession of the railroads was taken December 28, 1917, as of December 31, 1917, under a proclamation of the President. An Act was subsequently passed, approved March 21, 1918, governing the conduct of this Federal administration (40 Stat. at Large, 457, 1 Supp. Com. Stat. 1919, page 758). This Act provided, among other things, for compensation to be paid by the Government to the railroads. This compensation was to be fixed by a contract, or if not by a contract, then by partial payments during Federal control and a final [fol. 160] settlement. The following provisions were made in regard to taxes. This is from Section 1 of the Act:

"Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto, or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of it's own funds, or shall be charged against or deducted from the just compensation."

Section 15 of the Act provides, as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

These taxes for 1917-1918 and 1918-1919 are therefore Government liabilities and not a liability of the corporation and therefore, as we have stated above, the opinion of the Court should be modified so that in affirming the judbment of the Court below it shall be affirmed as to the Director General, but reversed as to the Southern Railway Company.

In regard to the penalty, a binding authority on this subject, we submit, is that of Missouri Pacific Railroad Co. v. Ault, 256 U. S. 554. This case discusses very fully the language and the construction of the Act of Congress quoted as fixing the liability for everything that occurs during Government control under the Director General and as relieving the railroad companies from such liability. The opinion contains a discussion not only of the Act, but of Order No. 50 adopted by the Director General, and is exactly in line with the Kentucky case which we have above cited, namely, Commonwealth v. L. & N. R. R. Co., 189

Ky. 309, and Rogers v. Hines, 193 Ky. 795. In the case just cited, Missouri Pacific Railroad Co. v. Ault, 256, U. S. 554, the question of the liability of the Director General [fol. 161] for a penalty is fully dealt with. In this case it appears that a statute of Arkansas provided that whenever a railroad company discharged an employe, with or without cause, the railroad company should pay the discharged employe the wages due him within seven days of the discharge. Further, that if payment was not made within the above time, "then as a penalty for such nonpayment, the wages of such servant or employe shall continue from the date of the discharge or refusal to further employ at the same rate until paid." In August, 1918, Ault brought suit against the railroad company, alleging that he had been employed by the company at the rate of $2.50 per day; that he had been discharged on July 29, 1918, and that $50.00 was then due him as wages but had not been paid. He recovered judgment by default. The company appealed to the Circuit Court of the State and there moved in January of 1919 to substitute as the defendant the Director General of Railroads. The Court refused to make this substitution, but joined the Director General as a party defendant and rendered judgment against both the Director General and the railroad company upon a verdict that Ault recover the sum of $50.00 due him as wages, and $390.00 as penalty. The judgment was affirmed by the Supreme Court of Arkansas. The case was taken to the Supreme Court both on writ of error and certiorari. After passing on the merits of the case the Court said the following with regard to the proper form of appeal.

"The case is properly here on writ of error. The petition for writ of certiorari, consideration of which was postponed to the hearing on the merits, is therefore denied."

The court held that the judgment for the $50.00 should have been solely against the Director General and not against the railroad. In holding that the penalty could not be imposed on the Director General, the Court said:

"The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is rested specifically upon the clause in Sec. 10 to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law,' and the provision in Sec. 15 that the 'lawful police regulations of the several States' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, State and Federal, which prescribe how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate [fol. 162] any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The Director General adopted a much more effective and direct method: 'Now that the railroads are in possession and control of the Government, it would be futile to impose fines for violations for said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishment for willful and inexcusable violations thereof upon the person or persons responsible therefor.' General Order No. 8, Id., p. 167.

"The purpose for which the Government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order, 'provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' (Our italics.) Wherever the law permitted compensatory damages they may be collected against the carrier under Federal control. Such damages may reasonably include interest and costs. See Hines v. Taylor, 79 Florida, 218. But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See Hines v. Taylor, supra; Jackson-Tweed Lumber Co. v. Southern Ry. Co., 113 S. Car. 236. The amount recovered in the present case over and above the wages due and unpaid with interest is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring: 'It is allowed for a doublt purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages.' Leep v. Railway Co., 58 Arkansas, 407, 440-441. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of State, but of Federal law. Whatever name be applied, the element of punishment clearly predominated and Congress has not given its consent that suits of this character be brought against the United States. The judgment against the Director General, so far as it provided for recovery of the penalty, was erroneous.

"The case is properly here on writ of error. The petition for writ of certiorari, consideration of which was postponed to the hearing on the merits, is therefore denied. Judgment reversed."

This question was again before the Supreme Court of the United States in the case of Norfolk-Southern R. R. Co. v. Owens, 256 U. S. 565. The opinion is very short, and is as follows:

"This case comes here on writ of certiorari (251 U. S. 550) to the Supreme Court of North Carolina, which affirmed (178 N. Car. 325) a judgment of $21 against the [fol. 163] Norfolk-Southern Railroad Company in favor of Owens, a shipper. The amount was assessed under a statute of the State as a penalty for undue delay in making delivery of an intrastate shipment made March 27,

1918. At that time the railroad was in the possession and control of the Government, and was being operated by the Director General under the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451. The only question presented for decision is whether the company was liable for the penalty. We are of opinion that it was not, for the reasons stated in Missouri Pacific R. R. Co. v. Ault, decided this day, ante. 554." That this twenty per cent is a penalty appears from the statute itself—4241 Ky. Stat. Thus it is said in this statute:

> "All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty percentum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof."

In the case of Bank of Kentucky v. Commonwealth, 107 S. W. 812, 32 Ky. L. R. 1087, there is a full discussion of the question as to what amount a delinquent taxpayer shall pay. It is there held that the amount of the taxes assessed shall bear interest at six per cent. The Court goes on to consider what is the amount to be paid on account of the penalty. On this subject this Court said:

> "The penalty of 20 percent is given by the statute on the amount of the taxes due. A 20 per cent penalty on the taxes and interest is not allowed. The agent filing the s-atement is entitled to the penalty of 20 per cent. He gets this in all cases whether long or short. He takes the bad with the good. What the taxpayer owes is the taxes. A penalty of 20 per cent is added for his delinquency, and, under the rule above referred to, the taxes in cases like this bear interest at 6 per cent where the collection of the money is prevented by the taxpayer by legal proceedings; but we know of no principle justifying us in adding interest to the penalty. The rule is that penalties do not bear interest, and it seems to us it would be a harsh rule to add a penalty of 20 per cent to the taxes and then make both penalty and taxes bear interest at 6 per cent. This would be to make the cost of legal proceedings to test the legality of assessments oppressive, when unsuccessful, and such an additional penalty for delay cannot be enforced without statutory authority. If the penalty as well as the taxes

went to the State, it would hardly be maintained in the absence of a statute that the penalty of 20 per cent should be added to the taxes and that after this both the penalty and the taxes should bear interest at 6 per cent. The fact that the State pays its agent by giving him the penalty adds nothing to the penalty. The liability of the taxpayer is not affected by the way the State pays its officer.

"We therefore conclude the appellant must pay interest on the taxes, but not on the penalty."

[fol. 164] We respectfully request, therefore, that a rehearing be granted or that the opinion be modified by directing a reversal of the second case, that is, the case relating to the taxes during Government control shall be reversed with directions to dismiss the proceedings so far as the Southern Railway Company is concerned, and to modify the judgment against the Director General by striking out the provision in regard to penalties.

Respectfully submitted, Humphrey, Crawford & Middleton, Wallace & Harris, Attorneys for Appellants.

In Court of Appeals of Kentucky

[Title omitted]

Response to Appellee's Reply to Petition for Rehearing or Modification of Opinion

It is not our purpose to elaborate on the points heretofore made in our Petition for Rehearing or Modification of Opinion, nor do we deem it necessary to respond to appellee's reply thereto further than to call the attention of the court to the fact that the case of St. Louis and San Francisco Railroad Company v. Middlekamp, 256 U. S. 226, relied on by appellee is not in point.

It will be recalled that in our Petition for Rehearing two points were made:

1. That the judgment for the years during which the railroad was being operated by the Director General should have been against that officer alone, and that the inclusion

of the Southern Railway Company in this judgment was erroneous.

2. That no penalty could be assessed against the Director General.

The Middlekamp case above referred to is cited in opposition to the first point.

However, the Middlekamp case is not contra to the first point and is not authority in this case, because the tax discussed in that case was not such a tax as the Government obligated itself to pay when it took over the railroads. The tax there assessed was simply an excise tax on the corporations' "right to be," and not a tax on the property of the railroad or its right to operate as a carrier.

Before going further, it is well to call the court's attention to the fact that the word "franchise" as used in tax matters and with regard to corporations is frequently misused, so that the mere fact that the word "franchise" may be used in a certain tax matter is no indication that it means the same as it does in another different case. We also call the court's attention to the fact that corporations have two franchises, known as:

1. Corporate or general franchises.
2. Special or secondary franchises.

[fol. 165] By the first franchise is simply meant the right of the corporation "to be." By the second franchise is meant those certain rights or special privileges which it may possess.

Fletcher, Cyclopedia, Corporations, vol. 2, page 2107:

"For practical purposes, franchises, so far as relating to corporations, are divisible into (1) corporate or general franchises and (2) special or secondary franchises. The former is the franchise to exist as a corporation, while the latter are certain rights and privileges conferred upon existing corporations, such as the right to use the streets of a municipality to lay pipes or tracks, erect poles or string wires."

P. 2109: "Corporate or General Franchise. The franchise to exist as, or be, a corporation, ordinarily called the corporate franchise, is a separate and distinct form of franchise. This franchise is also referred to as the 'primary' franchise.''

''This 'General franchise' of a corporation as it is sometimes called, is its right to live and to do business by the exercise of the corporate powers granted by the State.''

P. 2114: ''Special or Secondary Franchise. All of the franchises possessed by a corporation, except the franchise to be a corporation which belongs to the corporators, are included in what are known as special or secondary franchises. For instance, the decisions hold that the franchise of a railroad corporation to exist as a corporation is a general franchise, while its right, even when conferred by the same statute, to construct and maintain a railroad, is a special franchise.''

The tax involved in the Middlekamp case is a tax on this primary franchise, that is on the corporation's right ''to be,'' and is in no sense a property tax such as is the franchise tax involved in the present case. It was therefore not such a tax as the Government obligated itself to pay when it took possession of the railroads.

The Act of Congress taking over the railroads, copied on page 5 of our Petition for Rehearing, provided as follows:

* * * ; ''that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid out of the revenues derived from railway operations while under Federal control * * *.''. (40 Stat. at Large, 457, 1 Supp. Com. Stat. 1919, page 758.)

In other words, the Government obligated itself to pay the tax on the railroad property and the tax on the right to use such property as a carrier. It was obviously correct for the Government to pay such taxes because when it took over the railroad it took over the physical property of the corporations, and it also took over the right of such corporations to act as carriers. [fol. 166] While the Government had possession the corporations did not have any use of the property which they owned and had no right whatever to operate as a carrier. Therefore such taxes should be paid by the Government.

On the other hand, the Government did not take over the corporation itself. The corporation continued as such, and its rights "to be" was not affected by the Government's operation of the railroads. Therefore any tax imposed on the corporation's right "to be," or, in other words, on the primary franchise of the corporation, should be paid by the corporation itself. It was so held in the Middlekamp case. Such holding is obviously correct, but is no authority for the proposition that the corporation is liable for a tax on the property of the corporation while it was under Federal control.

We have seen that under the Act the Government made itself liable for taxes on the property of the corporation and on the right to operate as a carrier. The tax imposed in the present suit was levied under Kentucky Statutes, #4077, and while commonly called a franchise tax, it has been held to be a property tax.

C. & O. v. Commonwealth, 190 Ky. 552, 228 S. W. 15:

The court, referring to taxes imposed by #4077, says:

"The franchise tax is a property tax and is nothing more than the taxation of all the corporation's intangible property, including its capital."

To the same effect see:

Commonwealth v. Southern Pacific Co., 144 Ky. 803;
Henderson Bridge Co. v. Commonwealth, 99 Ky. 623;
L. & N. v. Greene, 244 U. S. 522-535.

Since therefore the franchise tax in the present instance is a property tax, that is, a tax on the intangible property, it comes directly within the language of the Act of Congress obligating the Government to pay for taxes on the property used under Federal control.

Obviously this intangible property tax should be assessed against the Government because such intangible property value only arose on account of the use of the tangible property by the Government in the business of a public carrier.

James v. Kentucky Refining Co., 132 Ky. 353, 113 S. W. 468:

"An examination of #4077, Kentucky Statutes, 1903, shows a classification of certain kinds of business, engaging in any of which is deemed the exercise of such a privilege, as that it is reckoned as property, because it gives to the more familiar forms of property employed in the business a peculiar earning value which it would not otherwise have."

[fol. 167] Furthermore this franchise tax provided for in #4077, Kentucky Statutes, is never imposed except as attendant upon tangible property.

James v. Kentucky Refining Co., 132 Ky. 353, 113 S. W. 468:

"It will be observed that it (the tax provided in #4077, Kentucky Statutes) is never taxed unless property otherwise taxable is employed in the designated occupations; nor is it ever taxed independent of or without reference to tangible property to which it is by this statute annexed."

Since, therefore, the franchise tax in the present case is a property tax, that is, a tax on the intangible property of the corporation, and since this intangible property only has a value on account of the use of the tangible property, which the Government had possession of and was operating, it is plainly such a property tax as should be assessed against the Government under the Act of Congress quoted supra.

Coming now to the Middlekamp case, 256 U. S. 226, it will be observed that the tax involved in that case is one imposed by the statutes of Missouri upon domestic corporations, Laws of 1917, page 237. The Act is copied with the Supreme Court opinion and provides:

"Every corporation organized under the laws of this State shall, in addition to all other fees and taxes now required to be paid, pay an annual franchise tax to the State of Missouri equal to three-fourths of one per cent of the par value of its outstanding capital stock and surplus * * *."

While denominated a franchise tax, just as is the tax imposed by #4077, Kentucky Statutes, it is apparent from a reading of the Act that the word "franchise" used in the

Missouri Act does not have the same meaning as when employed in connection with #4077 of our Kentucky Statutes. The Missouri Act imposed a tax on the primary franchise of the corporation, that is, on its right "to be," and is not a property tax as is the franchise tax imposed by #4077.

In State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission et al., 221 S. W. 721, the Supreme Court of Missouri had under consideration the identical tax Act involved in the Middlekamp case.

"This is a proceeding by writ of certiorari issuing out of this court, upon the petition of the Marquette Hotel Investment Company, against the state tax commission, to determine the amount of tax due from relator under the act commonly known as the Franchise Tax Act. Laws of Missouri 1917, p. 237."

In passing on this tax the court unequivocally held that it was not a property tax, as follows:

[fol. 168] "WILLIAMSON, J. (after stating the facts as above): The statute in question is denominated a franchise tax in the title and in the first section of the act: In relator's brief the first point made is that this is a 'franchise tax and not a tax upon property.' Respondent in its brief states that it 'readily agrees with relator that the franchise tax is not a property tax.' Since the law-making body and the contending parties are agreed upon this point, we think we may safely assume that this is a franchise tax, and so dispose of relator's contention No. 1."

It will be observed that the Missouri Franchise Tax Act is imposed on every domestic corporation; in other words, it is a tax on the primary franchise of the corporation, that is, simply on the corporation's right "to be."

The Middlekamp case was tried originally in the District Court of the United States for the Central Division of the Eastern District of Missouri before three judges. The opinion of these three judges rendered June 29, 1920, and from which the appeal was taken to the Supreme Court, construed the Missouri statute as an excise, and not a property tax. We make the following quotation from the opinion of the three judges in the District Court:

Per Curiam:

"This case came on for hearing upon an application for a temporary injunction, before Kimbrough Stone, Judge of the Circuit Court of Appeals of the Eighth Judicial Circuit, Arba S. Van Valkernburgh, Judge of the District Court of the United States for the Western District of Missouri, and Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa.

"Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and is a resident and citizen of said State.

"Defendant George H. Middlekamp is the Treasurer of the State of Missouri, and Frank W. McAllister is the Attorney General of said State.

"(1) By this petition in equity, the plaintiff challenges the validity and constitutionality of a certain *Cat* of the Legislature of the State of Missouri, approved April 9, 1917, which Act provides for a 'franchise tax' upon every corporation organized under the laws of the State of Missouri equal to 3-40 of one per cent of the par value of such corporacion's outstanding capital stock and surplus; or if part of its capital stock is employed in business in another state or country, a tax equal to 3-40 of one per cent of its capital stock employed in the State of Missouri. Provisions is also made for payment of a like tax by corporations not organized under the laws of the State, but doing business within the State. The details of the Act will be hereafter more fully referred to.

"(2) The Nature of This Tax.—A careful reading of the entire statute convinces us that the tax provided for is an excise tax—not a property tax. This is apparent not only [fol. 169] from the language used, but from the further fact which appears, of record, that the State of Missouri before the enactment by the Legislature, imposed taxes upon property, tangible and intangible, including the value of franchises, such as the right of way, depot grounds, etc.

"Furthermore, the Supreme Court of Missouri, construing this Missouri statute (State of Missouri, ex rel., v. The State Tax Commission, et al., filed April 9, 1920, and id. upon rehearing, filed May 18, 1920) specifically holds that this Act does not provide for a property tax. It is designated as a 'franchise tax,' which as applied herein, we think is better described as an 'excise tax.' This term avoids confusion with the tax properly devied upon franchises as property. The construction by the Supreme Court of Missouri of the language of the Legislature of Missouri, should not only be followed by this court, but we concur with the views of the Supreme Court of Missouri in the construction which they have placed upon the language of the Act. It is quite apparent that the Legislature in good faith attempted to impose an excise tax."

A Kansas Act similar to the Missouri Act was involved in the case of Kansas City Railway v. Kansas, 240 U. S. 227, and was held by the Supreme Court to be a tax on the corporation's right "to be."

P. 230. "By Chapter 135 of the Laws of 1913, of Kansas, every domestic corporation is required to pay to the Secretary of State an annual fee which is graduated according to the amount of its paid-up capital stock."

This Kansas Act was held to be a tax on the corporation's right to be and was thus upheld by the court:

P. 232: "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the State court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."

We submit therefore that the tax imposed in the Middlekamp case is an excise tax on the corporation's right "to be," and that therefore it was such a tax as the corporation should have paid, and the decision of the Supreme Court so holding is not in point in the instant case. Here we are dealing with a property tax which the Act of Congress provides shall be paid by the Government.

The insinuation is thrown out in appellee's response that the State might possibly lose its tax were the assessment against the Director General alone. We cannot think that the Commonwealth of Kentucky means to be in the position of claiming that the Federal Government would repudiate a tax obligation which it has obligated itself to pay. Fur-[fol. 170]*thermore this Court knows as a matter of judicial knowledge that during the Federal control, the Federal Government did pay all of the tangible and intangible property taxes on all of the railroads operating in Kentucky. The answer filed by the Director General, and not denied, alleges that during the operation of the railroad by Federal control the Director General filed the reports and paid the tangible and intangible taxes of the several railroads referred to in the original petition of the Commonwealth.

In conclusion we submit that:

1. Since the tax in the present case is a tax on property it is an obligation of the Federal Government during its operation of the railroad, and in no event can the railroad corporation itself be made liable for it, since during the years involved the railroad corporation did not have possession of its property or the right to operate as a carrier.

2. The Middlekamp case being a tax simply on the primary franchise corporation, that is its right "to be" and not being a tax on property either tangible or intangible, the tax was properly assessed against the railroad corporation itself, and the case is not in point in the present instance.

Wherefore we respectfully request as in our original petition for rehearing on modification of opinion that a rehearing be granted or that the opinion be modified by directing a reversal of the second case, that is the case relating to the taxes during Government control shall be reversed with directions to dismiss the proceedings so far as the Southern Railway Company is concerned and to modify the judgment against the Director General by striking out the provision in regard to penalties.

Respectfully submitted, Humphrey, Crawford & Middleton, Wallace & Harris, Attorneys for Appellants.

COURT OF APPEALS OF KENTUCKY

[Title omitted.]

REPLY TO APPELLANT'S PETITION FOR REHEARING

1. As to Judgment Against Southern R. Co.

The case of Missouri Pacific R. Co. vs. Ault, 256 U. S. 554, which is the basis of the petition is wholly unlike this case.

Ault had never been in the employment of the Missouri Pacific R. Co. He was employed by the director general after he took charge of the railroad and was never in the service of the company in any way. He was discharged by the Director General and $50.00 of his wages were not paid to him. He got a judgment for $50.00 with interest at six per cent from the time the money was due him and a pen- [fol. 171] alty of $390.00 for its non-payment when due against the director general who employed him and against the company who never employed him and was under no liability to him.

That is not by any means this case. This is a proceeding to secure the payment of taxes due the State of Kentucky. These taxes are a lien on the property of the Company and the person in possession of the property when the taxes are assessed is liable for the taxes under the express provision of the statute, which is in these words:

> "The Commonwealth and each county, incorporated city, town or taxing district, shall have a lien on the property assessed for the taxes due them respectively (for five years) which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale."
>
> Kentucky Statutes, Sec. 4021.

"The holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the first day of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

Ky. Statutes, Sec. 4023.

The assessment here was directed to be made May 20, 1922, (record p. 38). The liability was not fixed and no assessment could be made until that judgment was entered. At that time federal control had terminated ~~and~~ the property was in the possession of the railroad company. It was its property and in its possession. The state had then a lien on the property for the taxes so directed to be assessed and the claimant in possession is liable for the taxes. The court takes judicial notice when federal control began and when it ceased.

The railroad company being in possession of the property and being personally liable for the taxes which are a lien on the property, the judgment was properly rendered against it as well as the director general who had charge of the property when the assessment should have been made. The railroad company was at all times the holder of the legal title to the property and so was under the statute at all times liable to the State for the taxes. St. Louis R. Co. vs. Middlekamp, 256, U. S., 226.

To hold otherwise is to say that the State may after all lose its taxes; for the State can only sue the U. S. Government by its grace. Congress may repeal the act tomorrow and leave the State without remedy, but for its lien on the property and its right to collect from the person in possession when the assessment is made. The statute was so [fol. 172] worded to protect the State, when an assessment was omitted as here, ~~and~~ is made later.

In Commonwealth vs. L. & N. R. Co., 189 Ky., 309, it was held that a railroad company could not be indicted for failure to keep a suitable waiting room under federal control and in Rogers vs. Hines, 193 Ky., 795, the same ruling was made as to failure to furnish cars. These cases are in line with the Ault case, 256 U. S. 554, but they go no further. Here we have the right of the State of Kentucky to collect its taxes after federal control ceased under an assessment made after it ceased. The property is liable for the taxes, the company in possession must pay them, and it must present the matter in settling its accounts with the director general. The State could not disturb the property while under federal control; but, when federal control ceased, the sovereign state could look to the property and the person in possession for its taxes just as it could if there had never been any federal control of it.

Though these suits have been in court over five years, this objection was first made in the petition for rehearing. It was not made in the briefs in this court. It was not made in the circuit court, and it is earnestly submitted that it is an afterthought and without merit.

Section 15 of the Federal Control Act provides:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies or the issue of stocks and bonds."

The provision of the federal statute that taxes "Shall be paid out of the revenue derived from railway operation while under federal control" in nowise affects the State statute making these taxes a lien on the property and making the owner of the legal title and the claimant in possession, responsible therefor, and is no bar to the enforcement of the State's rights under it, after federal control has ceased. "The revenue derived from the railroad operation while under federal control," was insufficient to meet the charges thereon as provided by the federal statute; but clearly the taxes due the State were not for this reason to remain unpaid. The purpose of the federal statute was only to provide a mode of payment of the taxes. But when the taxes were not paid and federal control ceased, the taxes may be enforced just as they would be, if there had been no federal control. The rule is that a temporary statute expiring by its own limitation leaves the law as it was at its enactment. 25 R. C. L., p. 932.

The Supreme Court in deciding the Middlekamp case, 256 U. S. 226, did not rest its decision on the narrow view suggested by appellant. It rested its decision simply on the plain letter of the statute. The argument for appellant is rested alone on the first section of the Act. It ignores altogether the 15th section which was added to prevent the [fol. 173] very interpretation now urged. What else can these words mean and for what other purpose were they inserted?

"That nothing in this act shall be construed to ament, repeal, impair or affect the existing laws or powers of the state in relation to taxation."

The laws of Kentucky on which the judgment rests are expressly not impaired, repealed, or affected by the act. Their enforcement now in no way affects the transportation of troops, war material, or government supplies. The Act was never intended to affect state laws except for these purposes. That was the meaning of the Act. To give it any other construction is to ignore its plain language and its clear purpose and intent. All the laws of the state "In relation to taxation" are unaffected by the Act, not as appellant would contend, only the laws of the State and the powers of the State as to certain taxes. This provision of the statute includes property taxes on less than privileges taxes. It was inserted that the states might collect their taxes as before and not to require them to look alone to the Federal Government for them. Otherwise the State Government might be unable to exist, for the State could not enforce payment by the Federal Government. It can only be sued by its consent, and no way was provided for suits against it. The taxes were to be settled like other claims between the corporation and the United States; but the State is not a party to this settlement; it looks to its taxpayers and they settle with the United States. There can be no middle ground. Either the powers of the State "in relation to taxation were affected or were not affected." The 15th section of the Act was added to remove all doubt on the subject. No provision was made for the payment of taxes when the fund in the hands of the director general was exhausted. These taxes are claims arising two years after federal control ceased, and when a large deficit had arisen.

2. As to Penalty

While the twenty per cent is called a penalty in the statute, it is provided that fifteen per cent goes to the officer prosecuting the proceeding for his services and only five per cent goes into the treasury. The same provision is made in the judgment appealed from (record, p. 43). The cost of the collection must be borne either by the State or by the taxpayer. It is only just that he should pay this cost, rather than the other taxpayers of the State. To this extent, the twenty per cent though called a penalty is simply a provision for costs. The remaining five per cent goes into the treasury and is the only interest the State receives on its delayed taxes. In the Ault case interest at six per cent per annum on the amount found due was allowed against the director general from July 29, 1918, until paid. In this case all the interest charged for a greater delay is five per cent. This is certainly not punishment. It is only compensation for the delay in payment and is [fol. 174] less than one year's interest. In fact the twenty per cent is less than the interest allowed in the Ault case for the delay. To call this punishment is to trifle with words. The penalties held not enforci-ble in the Ault case are thus there defined.

"But double damages, penalties and forfeitures which do not merely compensate but punish, are not within the purview of the statute."

The twenty per cent here simply compensates the officer for his services and the State for the interest it had had to pay on the State warrants. The fact is the State is not made whole. In the Ault case, Ault got his $50.00 with legal interests. He was only denied $390.00 as a penalty in addition to this. The penalty was practically seven times the amount of his claim. That was plainly punishment, but not so is a provision for payment of costs and five per cent for delay in paying taxes.

"It is the legal duty of every person liable for taxes to pay the same when due, and the power of the State to impose on the taxpayer penalties for noncompliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, cannot be doubted. And if the State is compelled to resort to legal proceedings for the collection of its taxes it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case."

26 R. C. L., p. 386, sec. 344.

This objection like the other is first made in the petition for rehearing. It was not made in the briefs in this court or in the circuit court.

To deprive the officer of compensation in these proceedings is to nullify the statute authorizing such proceedings, for certainly officers will not so act without pay. They are liable for costs if unsuccessful. Plainly the statute does not mean that the State shall be without remedy in this class of cases.

This objection only applies to the director general. Plainly the railroad company is not within the purview of the opinion in the Ault case. That opinion so far as it deals with the question of penalty, only defines the liability of the director general and what is said there had no application to the railroad. As we have shown the twenty per cent. here is not allowed to punish, but for compensation, and it is properly allowed against the director general.

Federal control began on the 27th day of December, 1917, and ended on the 1st day of March, 1920.

This is a mere assessment proceeding. It was proper to make the railroad company and the director general defendants that both might be heard. The judgment properly made the assessment against both. This was for the protection of the company. Their rights as between themselves may be settled when their accounts are settled.

The whole spirit and purpose of the Control Act in rela- [fol. 175] tion to taxation was to provide against any conflict with the existing laws or powers of the State. The State may collect its taxes and the reasonable costs of collection are a part of the tax, so is interest on taxes delayed in payment. The allowance of twenty per cent. in cases like this was provided for by the State laws for this reason. The Federal Control Act in providing that it should not affect, amend, repeal or impair the tax laws of the State necessarily leaves unaffected the taxes and the rights of the State incidental to their non-payment, such as the right to cost and interest for the delay. The Federal Act was aimed at the removal of such things only as interfered with its designated purposes. The taxation of this property was provided for under the laws of the State that then existed and those laws also provide for the payment of the costs and compensation for the delay. Under no stretch of the imagination can it be contended that taxation of railroad property impeded the movement of troops or material. Therefore we say that the Federal Control Act has no bearing whatever on this case. Especially is this true since the assessment here was made long after Federal Control ceased.

Summing up in conclusion we submit:

1. To sustain the first point and hold that no judgment should go against the railway company is to hold that the State may only look to the Federal Government for its taxes and that it can in no way enforce payment though it has a lien on the property and the railway company has possession of it and holds the title to it.

2. To sustain the second point and hold that the twenty per cent should not be adjudged is to hold that the cost of the delayed assessment must be borne by the other taxpayers of the State and not by the property taxed, and that no allowance may be made to the State for interest on the taxes the payment of which has been delayed.

Certainly neither of these positions can be maintained, as to the corporation or the director general.

Respectfully, Leslie W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for Appellee.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER TO FILE PETITION FOR REHEARING, ETC.—Sept. 16, 1924

Came appellant by Counsel and filed motion that the petition for rehearing or modification of the opinion, and the response thereto, and the reply to such response heretofore filed in the Clerk's office, during vacation, be now noted and filed of record.

[fol. 176]. IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Oct. 10, 1924

The Court being sufficiently advised, it is considered, that the appellant's petition for rehearing in each of the foregoing cases, be and the same are hereby overruled.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 16, 1924

The plaintiff in error, the Southern Railway Company, assigns the following errors as having been committed herein:

1. The Court erred in rendering any judgment against the plaintiff in error, since it appears in the proceedings herein that during the several years for which retroactive assessments were made the property of the plaintiff in error was in charge of the Director General, and such judgment was contrary to the proclamation of the President and the acts of Congress relating to Federal control of railroads.

2. The Court erred in holding that the Southern Railway Company in Kentucky was in fact and in law the same as the Southern Railway Company.

3. The Court erred in holding that there was any such connection between the lines of the Southern Railway Company in Kentucky and the lines of the Southern Railway Company south of Danville, Kentucky as justified the assessment of a franchise tax against the Southern Railway

Company based upon the earnings of its system south of Danville, Kentucky, and in so holding there was imposed in effect a tax against the Southern Railway Company on account of property owned by it outside of the state of Kentucky, such imposition being in violation of the Fourteenth Amendment of the Constitution of the United States.

4. The Court erred in holding that a penalty should be adjudged against the Southern Railway Company for failure to assess its property during the years in controversy, whereas said property was at the time in the control of the Director General and there was no obligation upon it under the proclamation of the President and the acts of Congress relating to Federal control of railroads to make any return for assessment during those years.

[fol. 177] 5. The Court otherwise erred in its judgment herein.

October 16, 1924.

(Signed) D. E. Jeffries, C. W. Milner, Alex. P. Humphrey, for Plaintiff in Error.

[File endorsement omitted.]

[File endorsement omitted]

IN COURT OF APPEALS OF KENTUCKY

WRIT OF ERROR—Filed October 16, 1924

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said Court of Appeals of Kentucky before you in a suit between Commonwealth of Kentucky, by &c., and Southern Railway Company, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of such their validity; a manifest error has happened to the great damage of the said Southern Railway Company, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of November, 1924, in the said Supreme Court to be then and there held that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court, the 16th day of October, the year of our Lord Nineteen Hundred and Twenty-four.

J. W. Menzies, Clerk of the District Court, East. Dist. Ky. by Lillian M. Wiard, D. C. (U. S. District Court, East. Dist. Ky., U. S. America.)

Allowed by F. D. Sampson, Chief Justice of Court of Appeals of Kentucky.

[fol. 178] Bond on writ of error for $25,000, approved and filed October 16, 1924, omitted in printing.

Citation, in usual form, showing service on J. P. Hobson, filed October 16, 1924, omitted in printing.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS OF JAMES C. DAVIS—Filed October 16, 1924

The plaintiff in error, James C. Davis, Director General, assigns the following errors as having been committed herein:

1. The Court erred in holding that the properties of the Southern Railway Company south of Danville, Kentucky, had such connection with the properties of the Southern Railway Company in Kentucky as to justify an assessment in Kentucky of the franchise of the Southern Railway Company at all or as measured by the earnings upon its lines south of Danville, Ky.

2. The Court erred in holding that the properties of the Southern Railway Company in Kentucky are to be regarded as the property of the Southern Railway Company.

3. The Court erred in assessing a penalty against the plaintiff in error on account of taxes found due from him during any of the years in controversy, the assessment of such penalties being a violation of the proclamation of the President and the acts of Congress and the lawful orders of the Director General relative to Federal control of the Railroads.

4. The Court erred in holding that for the purpose of taxation by the Commonwealth of Kentucky of the franchises of the Southern Railway Company there should be taken into consideration the earnings of the Southern Railway Company over its system south of Danville, Kentucky.

5. The Court erred in holding that there was any such connection between the properties of the Southern Railway Company in Kentucky and the properties of the Southern Railway Company south of Chattanooga, Tennessee, by reason of assumed connection of the properties of the Southern Railway Company in Kentucky at Danville, Kentucky, and the properties of the Southern Railway Company at Chattanooga, Tennessee, through the properties of the Cincinnati, New Orleans & Texas Pacific Railway Company extending from Danville, Kentucky, to Chattanooga, Tennessee, as justified the assessment of a franchise tax against the Southern Railway Company based upon the earnings [fol. 179] of its system south of Danville, Kentucky, and in so holding there was imposed in effect a tax against the Southern Railway Company on account of property owned by it outside of the State of Kentucky, such imposition being in violation of the Fourteenth Amendment of the Constitution of the United States.

6. The Court erred in approving an assessment of the franchises of the Southern Railway Company by taking into consideration the earning of its property south of Chattanooga, Tennessee, because to do so was to make an assessment in Kentucky of property outside of the State of Kentucky, and in so doing there was a violation of the Fourteenth Amendment of the Constitution of the United States.

7. The Court otherwise erred in its judgment herein.

L. E. Jeffries, C. W. Milner, Alex P. Humphrey, Attorney- for Plaintiff in Error.

[File endorsement omitted.]

[File endorsement omitted]

IN COURT OF APPEALS OF KENTUCKY

WRIT OF ERROR—Filed Oct. 16, 1924

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said Court of Appeals of Kentucky before you in a suit between Commonwealth of Kentucky, by &c., and James C. Davis, Director General, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of such their validity; a manifest error has happened to the great damage of the said James C. Davis, Director General, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of November, 1924, in the said Supreme Court to be then and there held that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

[fol. 180] Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court, the 16th day of October, the year of our Lord Nineteen Hundred and Twenty-four.

J. W. Menzies, Clerk of the District Court, East. Dist. Ky., by Lillian M. Ward, D. C. (Seal U. S. District Court, East. Dist. Ky., U. S. of America.)

Allowed by F. D. Sampson, Chief Justice of Court of Appeals of Kentucky.

IN COURT OF APPEALS OF KENTUCKY

EXHIBIT IN EVIDENCE—Filed Oct. 16, 1924

United States Railroad Administration, Washington, January 11, 1919

General Order No. 50-A

General Order No. 50, issued October 28, 1918, is hereby amended to read as follows:

It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of the General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way a service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such action at law suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director [fol. 181] General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process or otherwise in respect of any such cause of action or proceeding.

Walker D. Hines, Director General of Railroads.

254 Fed. 880; 255 Fed. 795; 174 N. Y. Supp. 536.

[File endorsement omitted.]

Citation, in usual form, showing service on J. P. Hobson, filed Oct. 16, 1924, omitted in printing.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 5, 1924

For the purpose of an appeal to the United States Supreme Court, the Clerk of the Court of Appeals of Kentucky will please copy:

1. The entire record of the first appeal, including exhibits B files with answer, except that the following pages only will be copied from the printed stockholders' reports:

1914—pages 17, 67, 69.
1915—pages 15, 68, 69.
1916—pages 55, 56.
1917—pages 57, 53.
1918—pages 19, 21.

2. The entire record on second appeal.
3. Petition for rehearing.
4. Opinions of the Court (2).

Humphrey, Crawford & Middleton, Attorneys for Appellants. Hobson & Hobson, Attorneys for Appellees.

[File endorsement omitted.]

[fols. 182-354] IN COURT OF APPEALS OF KENTUCKY

RETURN TO WRIT OF ERROR

In obedience to the commands of the attached Writs of Error, I hereby transmit to the Supreme Court of the United States a complete transcript of the record called for in the Schedule, with all things touching the same, as appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, on this the 11th day of November, 1924.

Jno. A. Goodman, Clerk Court of Appeals of Kentucky. (Seal Court of Appeals, Kentucky.)

Fee for transcript, $133.50.

Endorsed on cover: File Nos. 30,723, 30,724. Kentucky Court of Appeals. Term No. 758. Southern Railway Company, plaintiffs in error, vs. Commonwealth of Kentucky, by, &c. Term No. 759. James C. Davis, Director General, plaintiff in error, vs. Commonwealth of Kentucky, by, &c. Filed December 3rd, 1924. File Nos. 30,723, 30,724.

[fols. 355 & 356] [Captions omitted]

[fol. 357] IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY, etc., Appellants,

vs.

SOUTHERN RAILROAD CO., etc., Appellees

NOTICE OF FILING OF MANDATE—Filed Nov. 7, 1927

The defendants are notified that the plaintiffs have filed in the Circuit Clerk's office a copy of the mandate herein.

This October 24, 1927.

J. P. Hobson.

Service of the above notice is accepted this October 25, 1927.

Humphrey, Crawford & Middleton.

IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY, by, &c.,

vs.

SOUTHERN RAILWAY IN KY.

COMMONWEALTH OF KENTUCKY, by, &c.,

vs.

SOUTHERN RAILWAY CO.

MINUTE ENTRY—Nov. 3, 1927

Came plaintiffs by attorney and filed the mandate of the Court of Appeals in the foregoing styled causes.

[fol. 358] IN COURT OF APPEALS OF KENTUCKY, FALL TERM, OCTOBER 7, 1927

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, by FRANK BOHANNON, Sheriff Woodford County, Appellee,

Appeal from a Judgment of the Woodford Circuit Court

and

SOUTHERN RAILWAY COMPANY and JAMES C. DAVIS, Director General of Railroads, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, by FRANK BOHANNON, Sheriff of Woodford County, Appellee.

Appeal from a Judgment of the Woodford Circuit Court

MANDATE—Filed in Circuit Court Nov. 3, 1927

The mandates of the Supreme Court of the United States having heretofore been filed said Mandate being in words and figures as follows, to-wit:

"On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Court [fol. 359] of Appeals in this cause be, and the same is hereby reversed with costs; and that the said appellant, the Southern Railroad Company, recover against the said appellee seven hundred and sixty-four dollars and thirty cents, for its costs herein expended and have execution therefor.

"And it is further ordered that the cause be, and the same is hereby, remanded to the said Court of Appeals for further proceedings not inconsistent with the opinion of this Court."

In consideration thereof it is now ordered by this Court that the judgment entered herein June 13, 1924, and which reads as follows:

"The Court being sufficiently advised, it seems to them the judgment herein is erroneous in part.

It is therefore considered that the judgment in the first case, in so far as it related to the years 1914 and 1916, be reversed, and the judgment in the other case relating to 1917 and 1918, be affirmed. Which is ordered to be certified to the said Court."

be and the same is hereby modified as to read as follows:

"The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that the judgment in the first case, in so far as it related to the years 1914 and 1916, be reversed, and that the judgment in the other case relating to 1917 and 1918, is also hereby reversed; and these causes, [fol. 360] which were directed to be heard together, are hereby remanded to the Woodford Circuit Court for further proceedings not inconsistent with the opinion of the Supreme Court of the United States".

A Copy. Attest:
John A. Goodman, C. C. A., by W. B. O'Connell, D. C.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

MINUTE ENTRY—Nov. 2, 1928

Came the parties by attorneys. Plaintiffs filed an Amended Statement. Defendant, Southern Railway Company, filed a Special and General Demurrer thereto, which being heard by the Court is overruled and said defendant excepts. Came defendants and filed Answer. Came plaintiffs and filed Demurrer to the fifth paragraph thereof, which, being considered by the Court, is sustained, to which [fol. 361] defendants except.

Came plaintiffs and filed Reply and by consent of parties the affirmative allegations thereof are controverted of record.

Came plaintiffs and suggested that J. R. Bond is the present Sheriff of Woodford County and on their motion he is made a party plaintiff, as relator herein.

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED STATEMENT—Filed Nov. 2, 1928

Comes now the plaintiff, Commonwealth of Kentucky, by Robert Hawkins, Sheriff of Woodford County, Kentucky, and amends its statement as heretofore filed for the purpose of making a claim for taxes against the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company and to conform with the opinion of the Supreme Court of the United States; and for its amendment says that said defendant, Southern Railway Company, for and during the [fol. 362] said years ending June 30, 1917, on which the taxes for the taxing year 1918 were to be computed, operated and controlled and owned a line of railway known as the Cincinnati, New Orleans and Texas Pacific Railway Company, hereinafter C., N. O. & T. P.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for said year to file a report with the Auditor of Public Accounts before October First thereof showing the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock paid up; the par and real value thereof; the highest price at which said stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months preceding and certain other facts in plaintiff's original petition alleged and which were required by law.

Said C., N. O. & T. P. is a corporation organized and existing under the laws of the State of Kentucky with power to act as a common carrier, but a large majority of its capital stock was at all times herein mentioned owned by defendant; and the railway mileage of said C., N. O. & T. P. was at all times herein mentioned, operated and con- [fol. 363] trolled by defendant. A report was filed by C., N. O. & T. P. reporting only the length of the lines operated by it and its property and earnings for said year. An assessment was made against said C., N. O. & T. P. of its property and franchise in the sum of $9,181,368.00. The length of the lines of said C., N. O. & T. P. within this state was 197.50 miles and its total lines both in and outside this state was 337.27 miles at all times herein mentioned.

No report was filed or assessment made in any way or in any form of the franchise of defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said report of said C., N. O. & T. P. and that report filed by the said Southern Railway in Kentucky as in the original statement alleged, which two said reports were in fact filed by defendant in the name of said two subsidiary companies. Defendant at all times, herein mentioned, operated, owned, and controlled the railway lines of the two said subsidiary companies and well knew its duties as herein above set out. Said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this state and for the purpose of excaping taxation. Said defendant did thereby conceal a portion of its property and did cause thereby a large portion of defendant's property in Kentucky to be omitted from assessment, to-wit; the franchise of said defendant. No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

Said mileage reported within Kentucky in the name of said Southern Railway Company in Kentucky was 165.78 [fol. 364] miles and the mileage reported within Kentucky in the name of said C., N. O. & T. P. was 197.50 miles for said year, making a total of 363.28 miles within this state which said mileage was at all times herein mentioned, operated, owned and controlled by defendant as a part of its general system, extending into the various states of the union. Said defendant in fact operated, owned, leased and controlled in this state for said year the said 363.28 miles and same were a part of its total system of railroad extending in the various states of the United States. Both inside and outside of this state said defendant, during said year, operated, owned, leased and controlled 8914.22 miles of railroad and said mileage in this state amounted to 4.075 per cent thereof. The net income or earnings of said defendant's total mileage during said year amounted to $33,673,556.09, which said earnings when capitalized at seven per cent amount to $481,050,801, which last mentioned sum is the true total value of the entire property of said defendant both in this state and out of this state. Plaintiff admits that during said year said defendant owned excess values in physical properties lying wholly without this state amounting to $62,868,941.86, which excess values may not be apportioned to this state, being entirely outside thereof. Four and .075 (4.075) per cent of said remaining valuations is $17,040,910.77 which last mentioned sum is the true proportion of the value of defendant's property in Kentucky for said year subject to taxation. Said sum is entitled to be equalized at 75% thereof according to the custom of the taxing authorities for said year, thus leaving an [fol. 365] equalized value of $12,780,683.08. For said year said defendant paid taxes in the name of said Southern Railway Company in Kentucky and said C., N. O. & T. P., in the total sum of $11,318,440, and is entitled to a credit for said amount, being the assessed value of said property and franchise of the two said subsidiary companies. The difference between said sums is the intangible property of defendant in Kentucky which was wholly omitted from assessment and from taxation for said year, to-wit: $1,462,243.08. Said last mentioned sum was the portion of defendant's property in this state which was wholly omitted from assessment and from taxation for said year and same was of the value of $1,462,243.08. Plaintiff says that said portion of omitted property has been omitted from assessment, is taxable and taxes thereon are just, due and unpaid.

Plaintiff withdraws all allegations in its original statement relative to the Mobile and Ohio Railroad Company, and relative to the Cumberland Railway Company and also to the Cumberland Railroad Company.

The defendant, Andrew W. Mellon or his predecessors in office, were at all times herein mentioned the duly appointed and qualified and acting director general of railroads.

Wherefore, plaintiff prays that this its amended statement be treated as a claim against said Cincinnati, New Orleans and Texas Pacific Railway Company; that the lines [fol. 366] and values of said C., N. O. & T. P. be included in the valuations of the defendant's property; that the omitted portion of the franchise or intangible property of defendant be fixed according to said opinion of said Supreme Court, and the same be assessed for taxation for the year 1918 and duly certified according to law. P*al*intiff further prays for its costs herein expended and for all proper relief.

Paragraph 2

Comes now the plaintiff, Commonwealth of Kentucky, by Robert Hawkins, Sheriff of Woodford County, Kentucky, and amends its statement as heretofore filed for the purpose of making a claim for taxes against the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company and to conform with the opinion of the Supreme Court of the United States; and for its amendment says that said defendant, Southern Railway Company, for and during the said year ending December 31, 1918, on which the taxes for the taxing year 1919 were to be computed, operated and controlled and owned a line of railway known as the Cincinnati, New Orleans and Texas Pacific Railway Company, hereinafter called C., N. O. & T. P.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for said year to file a report with the Auditor of Public Accounts before October 1st thereof showing the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock paid up; the par and real value thereof; the highest price at which [fol. 367] such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months preceding and certain other facts in plaintiff's original petition alleged and which were required by law.

The C., N. O. & T. P. is a corporation organized and existing under the laws of the State of Kentucky with power to act as a common carrier, but a large majority of its capital stock was at all times herein mentioned owned by defendant; and the railway mileage of said C., N. O. & T. P. was at all times herein mentioned, operated and controlled by defendants. A report was filed by C., N. O. & T. P. reporting only the length of the lines operated by it and its property and earnings for said year. An assessment was made against said C., N. O. & T. P. of its property and franchise in the sum of $973,208.00. The length of the lines of said C., N. O. & T. P. within this State was 197.50 miles and its total lines both in and outside this state was 337.27 miles at all times herein mentioned.

No report was filed or assessment made in any way or in any form of the franchise of defendant, and all its property and franchise were wholly omitted from assessment, except the said property embraced in said report of said C., N. O. & T. P. and that report filed by the said Southern [fol. 368] Railway in Kentucky as in the original statement alleged, which two said reports were in fact filed by defendant in the name of said two subsidiary companies. Defendant at all times herein mentioned operated, owned and controlled the railway lines of the two subsidiary companies, and well knew its duties as herein above set out. Said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this state and for the purpose of escaping taxation. Said defendant did thereby conceal a portion of its property and did cause thereby a large portion of defendant's property in Kentucky to be omitted from assessment; to-wit, the franchise of said defendant. No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

Said mileage reported within Kentucky in the name of said Southern Railway Company in Kentucky was 1[illegible] miles and the mileage reported within Kentucky i[illegible] name of said C., N. O. & T. P. was 197.50 miles for sa[illegible] year, making a total of 363.28 miles within this state which said mileage was at all times herein mentioned operated, owned and controlled by defendant as a part of its general system extending into various states of the union. Said defendant in fact operated, owned, leased and controlled in this state for said year the said 363.28 miles and same were a part of its total system of railroad extending into the various states of the United States. Both inside and outside of this state, said defendant during said year, operated, owned, leased and controlled 8,923.94 miles of railroad and said mileage in this state amounted to four .07 (4.07%) per cent thereof. The net income or earnings of said defendant's total mileage during said [fol. 369] year amounted to $35,821,133.69, which said earnings when capitalized at seven per cent amount to $511,730,481.28 which last mentioned sum is the true total value of the entire property of said defendant both in this state and out of this state. Plaintiff admits that during said year said defendant owned excess values in physical properties lying wholly without this state amounting to $76,196,015.35, which excess values may not be apportioned to this state, being entirely outside thereof. Four .07 per cent of said remaining valuations is $17,726,252.76, which last mentioned sum is the true proportion of the value of defendant's property in Kentucky for said year subject to taxation. Said sum is entitled to be equalized at 85% thereof according to the customs of the taxing authorities for said year, thus leaving an equalized value of $15,067,314.85. For said year defendant paid taxes, in the name of said Southern Railway Company in Kentucky and said C., N. O. & T. P. in the total sum of $11,312,280.00 and is entitled to a credit for said amount, being the assessed value of said property and franchise of the two subsidiary companies. The difference between said sums is the intangible property of the defendant in Kentucky which was wholly omitted from assessment and from taxation for said year, to-wit; $3,755,034.85. Said last mentioned sum was the portion of defendant's property in this state which was wholly omitted from assessment and from taxation for said year and the same was of the value of $3,755,034.85.

Plaintiff withdraws all allegations in its original statement relative to the Mobile and Ohio Railroad Company, [fol. 370] and relative to the Cumberland *and* Railway Company and also relative to the Cumberland Railroad Company.

The defendant Andrew W. Mellon, or his predecessors in office were at all times herein mentioned the duly appointed and qualified acting director general of railways.

The plaintiff says that for said year all railroad property was equalized at eighty-five per cent in the assessment of the franchise tax by the state board making the assessment of the railroads in the state, and not at seventy-five per cent as had been been done for previous years; that the World War was then waging; property values had gone up and other assessments of property were also increased. If the assessment of the Southern Railway Company is not so made then taxation in Kentucky will not be equal and uniformed as required by the Kentucky Statutes.

Wherefore plaintiff prays that this its amended statement be treated as a claim against said Cincinnati, New Orleans and Texas Pacific Railway; that the lines and values of said C., N. O. & T. P. be included in the valuations of defendant's property; that the omitted portion of the franchise or intangible property of defendant be fixed according to said opinion of said Supreme Court, and the same be assessed for taxation for the year 1919, and duly certified according to law. Plaintiff further prays for its costs herein expended and for all proper relief.

L. W. Morris, Dyke L. Hazelrigg, Hobson & Hobson, for Plaintiff.

[fol. 371] [File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

SPECIAL DEMURRER TO AMENDED STATEMENT—Filed Nov. 2, 1928

The defendant, Southern Railway Company, demurs to the plaintiff's amended statement herein because it shows that the Court has no jurisdiction of this defendant in this cause of action in that the taxes alleged to be due accrued during the time when this defendant's property was in the possession and control of the Government of the United States through the Director General of Railroads.

Alex P. Humphrey, Edward P. Humphrey, Charles W. Milner, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 372] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

GENERAL DEMURRER—Filed Nov. 2, 1928

The defendant, Southern Railway Company demurs to the amended statement herein because same does not state facts sufficient to constitute a cause of action against it.

Alex P. Humphrey, Edward P. Humphrey, Charles W. Milner, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 373] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

ANSWER TO AMENDED STATEMENT—Filed Nov. 2, 1928

Paragraph I

The defendants, Souther- Railway Company and Andrew W. Mellon, Director General of Railroads, and each of them, for answer to the first paragraph of the Amended Statement filed herein, deny that the said amended statement is for the purpose of conforming with the opinion of the Supreme Court of the United States; deny that any claim for taxes can be made against the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company which will be in conformity with the opinion of the Supreme Court of the United States; deny that for or during the said year ending June 30, 1917, on which taxes for the taxing year 1918 were to be computed, the defendant, Southern Railway Company, owned a line of railway known as The Cincinnati New Orleans and Texas Pacific Railway Company, and deny that for or during the said period the defendant Southern Railway Company operated or controlled the said Cincinnati, New Orleans and Texas Pacific Railway Company, except in the manner and to the extent [fol. 374] as set out in the amended answer of the defendant, Southern Railway Company and James C. Davis, Director General, filed May 20, 1922, and except as set out in the additional stipulation of facts signed by the respective parties through their counsel, and filed on May 20, 1922.

The defendants, and each of them, state that under the Acts of Congress duly passed, the Government of the United States took and held possession of and operated for the whole of the years 1918 and 1919, The Cincinnati, New Orleans and Texas Pacific Railway Company.

The defendants, and each of them, deny that under the Kentucky Statutes, so made and provided, it was the duty of these defendants, or either of them, for the taxing year mentioned in the first paragraph of the amended statement, viz: 1918, to file any report with the Auditor of Public Accounts of any kind, or of the kind mentioned in the Amended Statement, except in so far as it was the duty of the Director General of Railroads to file reports for the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, and The Cincinnati, New Orleans and Texas Pacific Railway Company, as having lines in Kentucky, and for railroads in no way involved herein.

The defendants, and each of them, deny that a large or any majority of the capital stock of the Cincinnati, New Orleans and Texas Pacific Railway Company, was at all or any of the times mentioned in the said amended statement [fol. 375] owned by the defendants, or either of them; deny that the defendant, Southern Railway Company, owned any of the capital stock of the said Cincinnati, New Orleans and Texas Pacific Railway Company, except as set out in the amended answer of the defendant, Southern Railway Company and James C. Davis, Director General of Railroads, filed May 20, 1922, and except as set out in the additional stipulation of facts signed by the respective parties through their counsel, and filed on May 20, 1922; deny that the railroad mileage of the Cincinnati, New Orleans and Texas Pacific Railway Company was at all or any of the times mentioned in the amended statement operated or controlled by the defendants, or either of them, except as set out in said answer and said stipulation of facts; deny that any report was filed by said Cincinnati, New Orleans and Texas Pacific Railway Company for the taxing year mentioned in the first paragraph of the statement, viz: 1918; deny that any report covering The Cincinnati, New Orleans and Texas Pacific Railway Company was filed covering said period of time except that the Director General of Railroads filed the report required by law for the said Cincinnati, New Orleans and Texas Pacific Railway Company.

The defendants, and each of them deny that the defendant, Southern Railway Company, had any property or franchise in the State of Kentucky for the taxing year mentioned in the first paragraph of the amended statement, viz: 1918; deny that the report of the said Cincinnati, New Orleans and Texas Pacific Railway Company, or the report filed by the Southern Railway Company in Kentucky, were in fact or at all filed by the defendant, Southern [fol. 376] Railway Company, in the name of said two subsidiary companies. The defendants, and each of them, deny that they or either of them, had or exercised any franchise whatever in the State of Kentucky, except as to the Director General of Railroads, franchises belonging to the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company, and franchises for railroads in no way involved herein. The defendants, and each of them, state that the Director General of Railroads operated the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company, and operated the said Cincinnati, New Orleans and Texas Pacific Railway Company under the franchises of the respective roads, and a report was filed on behalf of the Director General of Railroads for each of said roads with the proper authorities of the State of Kentucky.

The defendants, and each of them, deny that the defendant, Southern Railway Company, operated or owned any of the lines of the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, or of the said Cincinnati, New Orleans and Texas Pacific Railway Company, except as to the extent as alleged in the answer of the defendant, Southern Railway Company, and John Barton Payne, Director General of Railroads, filed June 28, 1920, and in the amended answer filed by the defendant, Southern Railway Company and James [fol. 377] C. Davis, Director General of Railroads, on May 20, 1922, and in the answers to interrogatories filed by the defendant, Southern Railway Company and Director General of Railroads on June 28, 1920, and in the stipulation of facts filed March 12, 1921, and in the amended stipulation of facts filed May 20, 1922, which said stipulations were signed by the respective parties by their respective counsel; deny that either of the defendants were under any duty whatever to file any report other than the reports which were filed. The defendants, and each of them, deny that said reports or any of them were filed for the purpose of concealing any property of either of the defendants, or for the purpose of escaping taxation on any property of either of the defendants in this State, and they deny that either of them did conceal any property or cause any property to be omitted from assessment, and deny that the franchises of the Southern Railway Company were subject in any way to assessment in Kentucky.

The defendants, and each of them, deny that the mileage reported within Kentucky in the name of the Southern Railway Company in Kentucky, to-wit: 165.78, or the mileage reported within Kentucky in the name of The Cincinnati, New Orleans and Texas Pacific Railway Company, to-wit: 197.50 miles for said year, making a total of 363.28 miles within this State, was at all or any of the times mentioned in the first paragraph of the amended statement herein, operated, owned or controlled by the defendant as a part of its general system extending into the various States of the Union, or that the defendant in fact operated, owned, leased or controlled in this State for said year the said 363.28 miles, or any number of miles, which were a [fol. 378] part of its total system of railroad extending into the various States of the United States, except as set out in the said answers and said stipulations of facts; deny that both inside and outside of this State the defendant during said year operated, owned, leased or controlled 8,914.22, or any number of miles less than 10,098.63; deny that the mileage in this State amounted to 4.075% thereof, or any per cent less than 4.209; deny that the net income or earnings of said defendant's total mileage during said period amounted to $33,673,556.09, or any amount less than $36,776,734.50; deny that said earnings when capitalized at 7% amounted to $481,050,801.00, or any sum less than $525,381,921.43; deny that $481,050,801.00 or any amount less than $525,381,921.43 is the true total value of the entire property of the defendant, Southern Railway Company and of the lines owned, operated, leased and controlled by it, both in this State and out of this State; deny that during said year the defendant owned excess values in physical properties lying wholly without this State amounting to $62,868,941.86, or any amount less than $68,851,913.86, which excess values may not be apportioned to this State, being entirely outside thereof; deny that 4.075% of said remaining value is $17,040,910.77; deny that said last mentioned sum is the true proportion of the value of defendant's property in Kentucky for said year subject to taxation; deny that the defendant had any property in Kentucky for said year subject to taxation; deny that there is an equalized value of $12,780,683.08, or any value of defendant's property subject to taxation in Kentucky for said year; deny that the defendants, or either of them, paid taxes for said year in the name of the said Southern Rail- [fol. 379] way Company in Kentucky and the said Cincinnati, New Orleans and Texas Pacific Railway Company in any sum, but state that the Director General of Railroads did for the Southern Railway Company in Kentucky, and the Cincinnati, New Orleans and Texas Pacific Railway Company, pay taxes in Kentucky on a valuation of $11,318,440.00, which said sum represented the total value of the property and franchise of the said two companies in

Kentucky which were liable for taxation; deny that the difference between the said sums is the intangible property of the defendants, or either of them, in Kentucky which was wholly omitted from assessment and from taxation for said year, to-wit: $1,462,243.08; deny that the defendants, or either of them, had any intangible property in Kentucky which was wholly or at all omitted from assessment and from taxation for said year; deny that the sum of $1,462,-243.08, or any sum, was the portion of defendant's property in this State which was wholly omitted from taxation for said year, or that the same was of the value of $1,462,-243.08; deny that any portion of defendant's property in this State was wholly omitted from assessment or from taxation for said year; deny that the defendants, or either of them, had any property in Kentucky which was omitted from assessment or which is taxable or on which taxes are just or due or unpaid.

Paragraph II

The defendants, Southern Railway Company and Andrew W. Mellon, Director General of Railroads, and each of them, for answer to the second paragraph of the amended statement filed herein deny that the said amended statement is for the purpose of conforming with the opin-[fol. 380] ion of the Supreme Court of the United States; deny that any claim for taxes can be made against the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company which will be in conformity with the opinion of the Supreme Court of the United States; deny that for or during the said year ending December 31, 1918, on which the taxes for the taxing year 1919 were to be computed, the defendant, Southern Railway Company, owned a line of railway known as The Cincinnati, New Orleans and Texas Pacific Railway Company, and deny that for or during the said period the defendant, Southern Railway Company, operated or controlled the said Cincinnati, New Orleans and Texas Pacific Railway Company except in the manner and to the extent as set out in the amended answer of the defendant, Southern Railway Company and James C. Davis, Director General, filed May 20, 1922, and except as set out in the additional stipulation of facts signed by the respective parties through their counsel, and filed on May 20, 1922.

The defendants, and each of them, state that under the Acts of Congress duly passed, the Government of the United States took and held possession of and operated for the whole of the years 1918 and 1919, The Cincinnati, New Orleans and Texas Pacific Railway Company.

The defendants, and each of them, deny that under the Kentucky Statutes, so made and provided, it was the duty of these defendants, or either of them, for the taxing year mentioned in the second paragraph of the amended statement, viz: 1919, to file any report with the Auditor of Public Accounts of any kind, or of the kind mentioned in the amended statement, except insofar as it was the duty [fol. 381] of the Director General of Railroads to file reports for the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company, as having lines in Kentucky, and for railroads in no way involved herein.

The defendants, and each of them, deny that a large or any majority of the capital stock of the Cincinnati, New Orleans and Texas Pacific Railway Company, was at all or any of the times mentioned in the said amended statement owned by the defendants, or either of them; deny that the defendant, Southern Railway Company, owned any of the capital stock of the said Cincinnati, New Orleans and Texas Pacific Railway Company, except as set out in the amended answer of the defendant, Southern Railway Company, and James C. Davis, Director General of Railroads, filed May 20, 1922, and except as set out in the additional stipulation of facts signed by the respective parties through their counsel, and filed on May 20, 1922; deny that the railroad mileage of the said Cincinnati, New Orleans and Texas Pacific Railway Company was at all or any of the times mentioned in the amended statement operated or controlled by the defendants, or either of them, except as set out in said answer and said stipulation of facts; deny that any report was filed by the said Cincinnati, New Orleans and Texas Pacific Railway Company for the taxing year mentioned in the second paragraph of the statement, viz: 1919; deny that any report covering The Cincinnati, New Orleans and Texas Pacific Railway Company was filed covering said period of time except that the Director General of Railroads filed the report required by law for the said [fol. 382] Cincinnati, New Orleans and Texas Pacific Railway Company.

The defendants, and each of them, deny that the defendant, Southern Railway Company, had any property or franchise in the State of Kentucky for the taxing year mentioned in the second paragraph of the amended statement, viz: 1919; deny that the report of the said Cincinnati, New Orleans and Texas Pacific Railway Company, or the report filed by the Southern Railway Company in Kentucky, were in fact or at all filed by the defendant, Southern Railway Company, in the name of said two subsidiary companies. The defendants, and each of them, deny that they or either of them had or exercised any franchise whatever in the State of Kentucky, except as to the Director General of Railroads, franchises belonging to the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company, and franchises for railroads in no way involved herein. The defendants, and each of them, state that the Director General of Railroads operated the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, and operated the said Cincinnati, New Orleans and Texas Pacific Railway Company under the franchises of the respective roads, and a report was filed on behalf of the Director General of Railroads for each of said roads, with the proper authorities of the State of Kentucky.

The defendants, and each of them, deny that the defendant, Southern Railway Company, operated or owned any of [fol. 383] the lines of the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, or of the said Cincinnati, New Orleans and Texas Pacific Railway Company, except to the extent as alleged in the answer of the defendant, Southern Railway Company and John Barton Payne, Director General of Railroads, filed June 28, 1920, and in the amended answer filed by the defendant, Southern Railway Company and James C. Davis, Director General of Railroads, on May 20, 1922, and in the answers to interrogatories filed by the defendant, Southern Railway Company, and Director General of Railroads on June 28, 1920, and in the stipulation of facts filed March 12, 1921, and in the amended stipulation of facts filed May 20, 1922, which said stipulations were signed by the respective parties by their respective counsel; deny that either of the defendants were under any duty whatever to file any report other than the reports which were filed. The defendants, and each of them, deny that said reports or any of them were filed for the purpose of concealing any property of either of the defendants, or for the purpose of escaping taxation on any property of either of the defendants in this State, and they deny that either of them did conceal any property or cause any property to be omitted from assessment, and deny that the franchise of the Southern Railway Company were in any way subject to assessment in Kentucky.

The defendants, and each of them, deny that the mileage reported within Kentucky in the name of the Southern Railway Company in Kentucky, to-wit: 165.78, or the mileage [fol. 384] reported within Kentucky in the name of The Cincinnati, New Orleans and Texas Pacific Railway Company, to-wit: 197.50 miles for said year, making a total of 363.28 miles within this state, was at all or any of the times mentioned in the second paragraph of the amended statement herein, operated, owned or controlled by the defendant as a part of its general system extending into the various states of the Union, or that the defendant in fact operated, owned, leased or controlled in this State for said year the said 363.28 miles, or any number of miles, which were a part of its total system of railroad extending into the various States of the United States, except as set out in the said answers and said stipulations of facts; deny that both inside and outside of this State the defendant during said year, operated, owned, leased or controlled 8,923.94 or any number of miles less than 9,939.10; deny that the mileage in this State amounted to 4.075% thereof, or any per cent less than 4.273; deny that the net income or earnings of said defendant's total mileage during said period amount to $35,821,133.69, or any amount less than $36,017,327.13; deny that said earnings when capitalized at 7% amounted to $511,730,481.28, or any sum less than $514,533,244.71; deny that $511,730,481.28, or any amount less than $514,533,244.71, is the true total value of the entire property of the defendant, Southern Railway Company, and of the lines owned, operated, leased and controlled by it, both in this State and out of this State; deny that during said year the defendant owned excess values in physical properties lying wholly without this State amounting to $76,196,015.35, or [fol. 385] any amount less than $82,206,800.59, which excess values may not be apportioned to this State, being entirely outside thereof; deny that 4.07% of said remaining value is $17,726,252.76; deny that said last mentioned or any sum is the true proportion of the value of defendant's property in Kentucky for said year subject to taxation; deny that the defendant had any property in Kentucky for said year subject to taxation; deny that there is an equalized value of $15,067,314.85, or any value of defendant's property subject to taxation in Kentucky for said year; deny that the defendants, or either of them, paid taxes for said year in the name of the said Southern Railway Company in Kentucky and the said Cincinnati, New Orleans and Texas Pacific Railway Company in any sum, but state that the Director General of Railroads did for the Southern Railway Company in Kentucky, and the Cincinnati, New Orleans and Texas Pacific Railway Company pay taxes in Kentucky on a valuation of $11,312,280.00, which said sum represented the total value of the property and franchise of the said two companies in Kentucky which were liable for taxation; deny that the difference between the said sums is the intangible property of the defendants, or either of them, in Kentucky which was wholly omitted from assessment and from taxation for said year, to-wit: $3,755,034.85; deny that the defendants, or either of them, had any intangible property in Kentucky which was wholly or at all omitted from assessment and from taxation for said year; deny that the sum of $3,755,034.85, or any sum, was the portion of defendant's property in this State which was wholly omitted from assessment and from taxation for [fol. 386] said year, or that the same was of the value of $3,755,034.85; deny that any portion of defendant's property in this State was wholly omitted from assessment or from taxation for said year; deny that the defendants, or either of them, had any property in Kentucky which was omitted from assessment or which is taxable or on which taxes are just or due or unpaid.

Paragraph III

The defendants, and each of them, reiterate, reaffirm and make a part hereof, each and every allegation made in the original and amended answers heretofore filed by them, and for further answer say that for the taxing years 1918 and 1919 dealt with in the amended statement herein, the Mobile and Ohio Railroad Company was a corporation duly organized under the laws of the State of Alabama, with powers to act as a common carrier; that since April 1901, a majority of the stock and securities of the said Mobile and Ohio Railroad Company has been owned and held by the defendant, Southern Railway Company; that the Cumberland Railroad Company is a corporation duly organized under the laws of the State of Kentucky with powers to act as a common carrier; that since its incorporation and during all of the times involved herein, the defendant, Southern Railway Company, has owned all of its stock except qualifying shares for directors; that the Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee, with powers to act as a common carrier; that since its incorporation and during all of the times involved herein the defendant, Southern Railway Company, has owned all of its stock except qualifying shares for directors; [fol. 387] that The Cincinnati, New Orleans and Texas Pacific Railway Company is a corporation duly organized under the laws of the State of Kentucky, with powers to act as a common carrier. In January 1917, the defendant, Southern Railway Company, controlled the Alabama Great Southern Railroad Company through ownership of a majority of its capital stock; that in January 1917, the defendant, Southern Railway Company, and the Alabama Great Southern Railroad Company acquired a majority of the capital stock of the Cincinnati, New Orleans and Texas Pacific Railway Company, so that the defendant, Southern Railway Company, could and did control through stock ownership The Cincinnati, New Orleans and Texas Pacific Railway Company from January 1917 to the present time.

The defendants, and each of them, say that under the Acts of Congress duly passed the Government of the United States took and held possession of and operated for the whole of the years involved, all of the railroads and railroad property of the defendant, Southern Railway Company, and of the lines owned, operated, leased or controlled by it, and that the said Director General of Railroads for each and all of said years operated the Southern Railway Company in Kentucky, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company, and that each of the taxing years involved herein, he filed all required reports with the proper taxing authorities of the State of Kentucky, for each of said railroads, and that assessments thereon were made as follows and that full taxes were paid on said assessments:

[fol. 388]

	Taxing year 1918	Taxing year 1919
Southern Railway Co. in Ky	$2,137,072.00	$2,139,072.00
C. N. O. & T. P. Railway Co	9,181,368.00	9,173,208.00
M. & O. Railroad Co	1,243,926.00	1,242,385.00
Cumberland Railroad Co	103,380.00	103,380.00
Cumberland Railway Co	15,675.00	15,675.00

The defendants, and each of them, say that the mileage within Kentucky of the Mobile and Ohio Railroad Company is 44.44 miles for each of the taxing years 1918 and 1919; that the mileage within Kentucky of the Cumberland Railroad Company is 12.90 miles for each of the taxing years 1918 and 1919; that the mileage within Kentucky of the Cumberland Railway Company is 2.09 miles for each of the taxing years 1918 and 1919.

The defendants, and each of them, say that for the taxing years dealt with in the amended statement herein, the assessing authorities of the State of Kentucky—the State Tax Commission—uniformly, systematically and intentionally assessed the franchise tax of all common carriers having lines within and without the State of Kentucky upon the following basis, to-wit:

The carrier's railway system was deemed to include the line owned, operated, leased or controlled by it, and whereever the carrier owned a majority of the capital stock of another carrier, such ownership of stock was deemed to constitute the second carrier as being owned by the first; that the net railway operating income of the carrier and of the lines owned, operated, leased and controlled by it,—taxes, hire or equipment and joint facility rents being deducted—was capitalized at 7%; there was then deducted the [fol. 389] total excess tangible values outside of the State of Kentucky of the carrier proposed to be assessed, and of the lines owned, operated, leased or controlled by it; there was then assigned to Kentucky the proportion that the number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky bore to the total number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky and elsewhere. The proportion thus assigned to Kentucky was equalized at 75% for the taxing year 1918, and equalized at 85% for the taxing year 1919; that from this equalized value assigned to Kentucky, there was then deducted the assessed value of the tangible property and the balance was deemed the value of the carrier's franchise on which a franchise tax was based.

The defendants, and each of them, say that it would be a violation of the Constitution of the State of Kentucky, and a violation of the Constitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof, for this Court to adopt any method of making an assessment herein (if any could be made) on a different basis from the one above described.

The defendants, and each of them, say that the figures named in the first and second paragraphs of the amended statement as to total mileage, total income, total excess values outside of the State of Kentucky, and percentage of the miles in Kentucky to the total miles, do not represent and are not the correct figures of the defendant, Southern Railway Company, and of the lines owned, operated, leased [fol. 390] or controlled by it, but that such figures and each of them are the figures representing the lines of the defendants, Southern Railway Company, and the railroads owned, operated, leased or controlled by it, excluding however the mileage, earnings, excess values and all other figures of the three railroads, which during each of said years, were owned by the defendant, Southern Railway Company, to-wit: the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company.

The defendants, and each of them, say that to assess a franchise tax on a basis which omits from all calculations the earnings, the mileage, excess values, and other figures of the said three common carriers, which during the years involved were owned by the defendant, Southern Railway Company, would be a violation of the Constitution of the State of Kentucky, and a violation of the Constitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof.

The defendants and each of them, say that heretofore and on May 20, 1922, a judgment was rendered herein by the Circuit Court adjudging that for the taxing year 1918 the value of the franchise of the defendant, Southern Railway Company, omitted from taxation was $1,730,090.02, and that for the taxing year 1919 the value of the franchise of the defendant, Southern Railway Company, omitted from taxation was $3,028,592.62; that said values were arrived at by the Court on the basis of using the total figures of the [fol. 391] defendant, Southern Railway Company, and of the lines owned, operated, leased and controlled by it, including the figures of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, and the Southern Railway Company in Kentucky, and were as follows:

Year Ending June 30, 1917, on Which Taxes for the Year 1918 Were Based

Net railway operating income, Southern Ry. Co., Va., and owned, operated, leased and controlled roads		$31,806,408.49
Net railway operating income C., N. O. & T. P		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
Deduct:		
Total outside excess tangible values; i. e., shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
Total outside excess tangible values; i. e., shops, terminals and double tracks, C., N. O. & T. P	1,019,582.15	
		68,851,913.86
Deduct total tangible outside values, we have		$456,530,007.57
Entire mileage, Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,761.36	
Entire mileage, C., N. O. & T. P	337.27	
	10,098.63	

Ky. mileage, Southern Ry. Co., Ky., M. & O. Cumberland R. R. and Cumberland Ry.	227 14	
Ky. mileage, C., N. O. & T. P	197 50	
	424 64	
Proportion Ky. to mileage (total) 4.209%-4.209% of $456,530,007.57, gives total value in Ky.		$19,215,348 02
[fol. 392] Equalized at 75%		$14,411,511 02
Values heretofore paid on tangible and intangible property in Ky., by Southern Ry. Co., Ky., M. & O., Cumberland R. R. & Cumberland Ry.	$3,500,053.00	
Values heretofore paid on tangible and intangible property in Ky. by C., N. O. & T. P	9,181,368 00	
		$12,681,421 00
Omitted value Southern Ry. Co., Va., franchise in Ky.		$1,730,090 02

Year Ended December 31, 1918, on Which Taxes for the Year 1919 Were Based

Net railway operating income Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$32,969,380 58

Net railway operating income C., N. O. & T. P		3,047,946.55
		$36,017,327.13
Capitalized at 7%		514,533,244.71
Deduct:		
Total outside excess tangible values, i. e., shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$80,160,065.06	
Total outside excess tangible values, i. e., shops, terminals, and double tracks C. N. O. & T. P.	2,046,735.53	
	$82,206,800.59	
Deduct total tangible outside values, we have		$432,326,444.12
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,601.83	
Entire mileage C. N. O. & T. P.	337.27	
	9,939.10	
Ky. mileage Southern Ry. Co. Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.11	
Ky. mileage C. N. O. & T. P.	197.50	
	424.61	

Proportion Ky. to total mileage 4.273%—4.273% of $432,326,444.12 gives total value in Ky.	18,473,308.96	
Equalized at 85%	$15,702,312.62	
[fol. 393] Values heretofore paid on tangible and intangible property in Ky., by Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky., by C. N. O. & T. P.	9,173,208.00	
		12,673,720.00
Omitted value Southern Ry. Co., Va., Franchise in Ky.		$3,028,592.62

The defendants, and each of them, say that the above figures, and each of them, used in the two above calculations of net railway operating income, outside excess tangible values, mileage and values heretofore paid on tangible and intangible property are and were the correct figures for the items which they purport to represent.

The defendants, and each of them, say that the said judgment was appealed to the Court of Appeals of Kentucky and was affirmed insofar as it affected the taxing years 1918 and 1919, and that said judgment of the Court of Appeals of Kentucky insofar as it affected the said years 1918 and 1919, was afterwards reversed by the Supreme Court of the United States (274 U. S. 76).

The defendants, and each of them, say that to assess taxes against the defendants, or either of them, on the above basis of calculation, would be a violation of the Constitution of the State of Kentucky, and a violation of the Constitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof, and that to assess the defendants, or either of them, on any other or different basis, would be a violation of the Constitution and laws of the State of [fol. 394] Kentucky, and a violation of the Constitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof, because the above basis is the same basis of calculation that was used for the taxing years involved herein with every other common carrier having lines within and without the State of Kentucky.

Paragraph IV

The defendants, and each of them, for further answer to the amended statement filed herein, say that for the year 1917, on which taxes for the year 1918 are based, the following figures are true for The Cincinnati, New Orleans and Texas Pacific Railway Company:

Net railway operating income....	$4,970,326.01
Total miles operated............	337.27
Net railway operating income.....	14,736.97 per mile

That said figures for the year 1918, on which taxes for the year 1919 are based, are and were as follows:

Net railway operating income	$3,047,946.55
Total miles operated	337.27
Net railway operating income	9,037.11 per mile

That full report was made by the Director General of Railroads, and full franchise tax was assessed against the said Cincinnati, New Orleans and Texas Pacific Railway Company by the proper assessing authorities of the State of Kentucky for said years, based upon the above figures, and said taxes for each of said years have been heretofore [fol. 395] paid to the State of Kentucky by the Director General of Railroads, who for said years was operating the said Cincinnati, New Orleans and Texas Pacific Railway Company for the Government of the United States.

The defendants, and each of them, say that corresponding figures for the defendant, Southern Railway Company, and the lines owned, operated, leased and controlled by it, excluding from all calculations any figures of The Cincinnati, New Orleans and Texas Pacific Railway Company, are as follows:

1917 on Which Taxes for 1918 are Based

Net railway operating income	$31,806,408.49
Total miles operated	9,761.36
Net railway operating income	3,258.399 per mile

1918 on Which Taxes for 1919 are Based

Net railway operating income	$32,969,380.58
Total miles operated	9,601.83
Net railway operating income	3,433.656 per mile

That corresponding figures for the defendant, Southern Railway Company, and the lines owned, operated, leased and controlled by it, including the line and figures of the Cincinnati, New Orleans and Texas Pacific Railway Company, are as follows:

1917 on Which Taxes for 1918 are Based

Net railway operating income	$36,776,734.50
Total miles operated	10,098.63
Net railway operating income	3,641.75 per mile

1918 on Which Taxes for 1919 are Based

Net railway operating income	$36,017,327.13
Total miles operated	9,939.10
Net railway operating income	3,623.81 per mile

[fol. 396] The defendants, and each of them, say that corresponding figures for the Southern Railway Company in Kentucky are as follows:

1917 on Which Taxes for 1918 are Based

Net railway operating income	$112,075.66
Total miles operated (excluding trackage rights)	127.62
Net railway operating income	878.19 per mile

1918 on Which Taxes for 1919 are Based

There was no net railway operating income, but a deficit of	$605,191.04
Total miles operated (excluding trackage rights)	127.62
There was no net railway operating income, but a deficit of	4,742.13 per mile

That including trackage rights of 38.05, the said figures for each of said years for the Southern Railway Company in Kentucky show, a net railway operating income of $676.50 per mile for the year 1917, on which taxes for the year 1918 are based, and a net railway operating deficit of $3,652.99 per mile for the year 1918, on which taxes for the year 1919 are based.

That the assessment of additional taxes as proposed in the amended statement filed herein based on the exclusion from all calculations of the three railroads operated in Kentucky which were owned by the defendant, Southern Railway Company, as hereinbefore set out, to-wit: the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, and the Cumberland Railway Company, would result in an additional assessment for the year 1918 of $1,462,243.08; and an additional assessment for the year 1919 of $3,755,034.85; that if the same allocation were made [fol. 397] as in the former judgment, to-wit: using the miles in Kentucky of the Southern Railway Company in Kentucky, and The Cincinnati, New Orleans and Texas Pacific Railway Company amounting to a total of 324.31, not counting trackage rights, the said proposed additional assessment would result in an increase in the franchise or intangible property valuation of the lines of the Southern Railway Company in Kentucky for 1918 of $4,508.78 per mile, and for 1919 of $11,578.53 per mile, whereas the actual net railway operating income of the said Southern Railway Company in Kentucky for the period on which the 1918 taxes are based was only 676.45 per mile, and for the period on which taxes for 1919 are based, there was no net railway operating income but a net deficit of $3,652.77 per mile; that the taxes have heretobefore been paid on all of the tangible property values of the Southern Railway Company in Kentucky, and on the franchise valuation based on the actual net railway operating income.

The defendants, and each of them, say that the said proposed additional assessment would result in an increase in the valuation of The Cincinnati, New Orleans and Texas Pacific Railway Company for 1918 of $4,508.78 per mile, and for 1919 of $11,578.53 per mile, whereas the said Cincinnati, New Orleans and Texas Pacific Railway Company has heretofore paid taxes on all of its tangible property in Kentucky and on its franchise based on the actual net railway operating income as set out above for the years involved, and which is higher than the average net railway operating income of the defendant, Southern Railway Company, and/or of the lines owned, operated, leased and controlled by it.

[fol. 398] The defendants, and each of them, say that the Supreme Court of the United States has heretofore held (274 U. S. 76-84) that the enforcement of an increase in the franchise valuation of the Southern Railway Company in Kentucky and of The Cincinnati, New Orleans and Texas Pacific Railway Company of $5,334.55 per mile for 1918, and of $9,338.34 per mile for 1919, or a total increase of $4,758,682.00 for the said two years, would violate the due process caluse of the Fourteenth Amendment to the Constitution of the United States, and defendants, and each of them, say that the enforcement of the proposed increase in the franchise valuation as claimed in the amended statement filed herein, of the Southern Railway Company in Kentucky, and of the Cincinnati, New Orleans and Texas Pacific Railway Company of $4,508.78 per mile for 1918, and of $11,578.53 per mile for 1919, or a total increase of $5,217,277.93, would also violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The defendants, and each of them, say that if all of the proposed additional assessment were allocated only against the mileage, excluding trackage rights, of the Southern Railway Company in Kentucky, it would result in an increase in the value of the said Southern Railway Company in Kentucky of $11,457.80 per mile for 1918, and an increase in value of $29,423.56 per mile for 1919.

The defendants, and each of them say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, [fol. 399] property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be a violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof.

The defendants, and each of them, say that if the Court should hold that the Southern Railway Company or the Director General of Railroads on account of his operation of the said Southern Railway Company for the years involved, or either of them, are subject to any assessment in this State by reason of any ownership, operation, lease or control of the properties of the Southern Railway Company in Kentucky, The Cincinnati, New Orleans and Texas Pacific Railway Company, the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company, or either of them, that then all values inherent therein, either tangible or intangible, have already been assessed by the proper assessing officers of the State of Kentucky, and to attempt to add to that assessment would be a violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof.

Paragraph V

The defendants, and each of them for further answer to the amended statement herein, say that the alleged causes of action, if any, set forth in said amended statement for taxes against the lines of The Cincinnati, New Orleans and [fol. 400] Texas Pacific Railway Company, and the defendants, and each of them, plead and rely upon the five year Statute of Limitation in such cases, made and provided, in bar of plaintiff's right to recover any taxes against the lines of the said Cincinnati, New Orleans and Texas Pacific Railway Company, or upon said alleged causes of action, or either of them, against the defendants, or either of them.

Wherefore, having fully answered, the defendants, and each of them, pray that the statement as amended be dismissed, and for their costs herein and all proper relief.

Edward P. Humphrey, Charles W. Milner, Attorneys for Defendants. Humphrey, Crawford & Middleton, of Counsel.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

DEMURRER TO FIFTH PARAGRAPH OF ANSWER

[fol. 401] Plaintiffs demur to the 5th paragraph of the answer to the Amended Statement for the facts stated therein do not constitute a defense to this action.

L. W. Morris, D. L. Hazlerigg, J. P. Hobson.

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

REPLY TO ANSWER TO AMENDED STATEMENT—Filed Nov. 2, 1928

The plaintiff denies that it would be a violation of the Constitution of the State of Kentucky, or a violation of the Constitution of the United States or the due process for equal protection clause of the Fourteenth Amendment thereof, for this Court to make an assessment on the basis set out in the amended statement, or to omit from its calculation any of the items set out in answer to the amended statement. Plaintiff says that the assessments named in the said answer were assessments of the corporations named therein and that no property or franchise of the Southern Railway Company was assessed at all and that the assess- [fol. 402] ments named were only partial assessments of the defendant's property held by it in the name of said corporations.

The defendant says that the figures upon which the judgment heretofore rendered by this Court were undisputed and the method of calculation was also undisputed and said figures were not made a part of the record and the exact figures used are now unknown to the plaintiff, and the plaintiff has no knowledge or information sufficient to form a belief that the figures set out in the answer to the amended statement are the figures upon which the judgment was based or that said figures so set out by the defendant are correct. The plaintiff denies that it would be a violation of the Constitution of Kentucky or a violation of any clause of the Constitution of the United States to assess taxes against the Southern Railway Company upon the basis of the figures so set out, or the figures set out in the amended statement herein filed.

Plaintiff denies that for the year 1917 the net railway operating income of the Cincinnati, New Orleans and Texas Pacific Railway was $4,970,326.01, or that the net railway operating income was $14,736.93 per mile, or that for the year 1918 the net railway operating income was $3,047,946.55, or the net railway operating income was $9,037.11 per mile, or any other sum other than those set out in the amended statement, or that the full franchise tax was assessed against the said Cincinnati, New Orleans and Texas Pacific Railway Company for said years, or either of them, based on any such figures. Plaintiff denies that the net [fol. 403] railway operating income of the Southern Railway Company excluding the figures of the Cincinnati, New Orleans and Texas Pacific Railway Company was $31,806,408.49 for 1917, or the net operating income per mile $32,583.99; or for 1918 that the net railway operating income was $32,969,380.58, or the net railway operating income was $3,433.65 per mile, or any other sum, other than those set out in the amended statement, or that the said figures for either of those years, including the said Cincinnati, New Orleans and Texas Pacific Railway, was any other sum than that set out in the amended statement.

Plaintiff denies that the net railway operating income of the Southern Railway Company in Kentucky was for 1917, $12,075.66, or that the net railway operating income was $878.19 per mile, or that for 1918 there was no railway operating income, or that there was any deficit in that year or any deficit per mile.

The plaintiff denies that the assessment sought herein would result in the increase in the valuation of the Cincinnati, New Orleans and Texas Pacific Railway Company for 1917 of $4,508.78 per mile, or for 1919 of $11,578.53 per mile, or any other sum, or that said corporation has paid taxes on its franchise based on the actual net railway operating income or on any other basis.

The plaintiff denies that the effort made herein is for the purpose of endeavoring to bring into the State of Kentucky for the purpose of taxation property not in Kentucky, or values pertaining to property not in Kentucky, or earnings derived from property not in Kentucky, or values [fol. 404] inherent on said properties, or any of them, either tangible or intangible, which are now sought to be assessed have been assessed in any way by any assessing officer of the State of Kentucky or that to attempt to make an assessment now would be a violation of the Constitution of Kentucky or any provision of the Constitution of the United States.

Plaintiff says that the Southern Railway Company during the years named owned, operated and controlled the Southern Railway Company in Kentucky, also the line known as the Cincinnati, New Orleans and Texas Pacific Railway Company and the line known as the Ohio and Mobile Railway, but that the defendant though owning, operating and controlling these lines, to avoid the payment of a franchise tax in Kentucky pretended to operate these lines in the name of the corporation known as the Southern Railway in Kentucky and another corporation known as the Cincinnati, New Orleans and Texas Pacific Railroad Company, and another corporation known as the Ohio and Mobile Railway Company, all of which were but dummies owned and controlled by the Southern Railway Company, operated by the same men who in so operating them were the agents of the Southern Railway Company, or officers of the Southern, all of these companies being exactly the same, and said pretended corporations were simply maintained by the Southern Railway Company to avoid franchise taxes in Kentucky. It made reports to the State of Kentucky in the name of these dummy corporations and the assessments referred to in the answer were assessments of these dummy corporations, and no assessment whatever was made [fol. 405] against the Southern Railway Company. The purpose of this action is to assess against the Southern Railway Company its property just as it would have been assessed if the business in Kentucky had been done in its own name instead of being done, as it was by it, in the name of these dummy corporations.

Wherefore the plaintiff prays judgments as in the amended statement, and for costs, and all proper relief.

L. W. Morris, D. L. Hazelrigg, J. P. Hobson.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

MINUTE ENTRY—Nov. 2, 1928

Came the parties and filed stipulation of facts. Came plaintiff and moved to file amended statement to which the defendants objected, the Court sustained the motion to which he defendants excepted and by consent of parties the allegations of the amendment are controverted of record. The case was thereupon submitted on the merits and after [fol. 406] argument of Counsel was taken under advisement by the Court.

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

STIPULATION OF FACTS—Filed Nov. 2, 1928

The parties hereto by their respective counsel hereby stipulate the following facts as applicable to this case for the purpose of a trial in the Circuit Court:

1. The record heretofore made is all to be considered by the Court without being recopied.

2. During all of the times involved herein, the defendant, Southern Railway Company, owned a majority of the stock of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company.

3. The judgment heretofore rendered by the Circuit Court on May 20, 1922, adjudging that the value of the omitted part of the franchise of the defendant, Southern [fol. 407] Railway Company, for the fiscal year beginning July 1, 1917, was $1,730,090.00, and for the fiscal year beginning July 1, 1918, was of the value of $3,028,592.00, and said judgment was affirmed by the Court of Appeals of Kentucky and reversed by the Supreme Court of the United States, and was arrived at by including in all calculations the total figures of the defendant, Southern Railway Company, and of the lines owned, operated, leased and controlled by it, including the figures of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company, the Cumberland Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company and the Southern Railway Company in Kentucky, and said calculations are as follows:

Year Ended June 30, 1917, on Which Taxes for the Year 1918 were Based

Net railway operating income, Southern Ry. Co., Va. and owned, operated, leased and controlled roads		$31,806,408.49
Net railway operating income C., N. O. & T. P.		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
Deduct:		
Total outside excess tangible values, i. e., shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
Total outside excess tangible values, i. e., shops, terminals and double tracks C., N. O. & T. P.	1,019,582.15	
		68,851,913.86
Deduct total tangible outside values, we have		$456,530,007.57
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,761.36	
Entire mileage, C., N. O. & T. P.	337.27	
	10,098.63	

[fol. 408] Ky. mileage, Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.14	
Ky. mileage C., N. O. & T. P.	197,50	
	424.64	
Proportion Ky. to total mileage 4.209%—4.209% of $456,530,007.57, gives total value in Ky.		$19,215,348.02
Equalized at 75%		14,411,511.02
Values heretofore paid on tangible and intangible property in Ky. by Southern Ry Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,053.00	
Values heretofore paid on tangible and intangible property in Ky. by C., N. O. & T. P.	9,181,368.00	
		12,681,421.00
Omitted value Sou. Ry. Co. Va. franchise in Ky.		$1,730,090.02

Year Ended December 31, 1918, on Which Taxes for the Year 1919 were Based

Net railway operating income Southern Ry. Co., Va., and owned, operated, leased and controlled roads	32,969,380.58

Net railway operating income C., N. O. & T. P.		3,047,946.55
		$36,017,327.13
Capitalized at 7%		$514,533,244.71
Deduct:		
Total outside excess tangible values, i. e., shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$80,160,065.06	
Total outside excess tangible values, i. e., shops, terminals and double tracks of C., N. O. & T. P.	2,046,735.53	
		82,206,800.59
Deduct total tangible outside values, we have		$432,326,444.12
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,601.83	
Entire mileage C., N. O. & T. P.	337.27	
	9,939.10	
Ky. mileage Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.11	
Ky. mileage C., N. O. & T. P.	197.50	
	424.61	

[fol. 409] Proportion Ky. to total mileage, 4.273%—4.273% of $432,326,444.12 gives total value in Ky.		$18,473,308 96
Equalized at 85%		15,702,312 62
Values heretofore paid on tangible and intangible property in Ky., by Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky. by C., N. O. & T. P.	9,173,208.00	
		12,673,720 00
Omitted value Southern Ry Co., Va., franchise in Ky.		$3,028,592 62

Before the above calculations were made one of the attorneys for the plaintiff and one of the attorneys for the defendant went together to the Kentucky Board to learn how such taxes were computed by it and they then got up the above calculations just as such taxes were computed by the Board.

4. The figures of net railway operating income, of outside excess tangible values, of entire mileage, of Kentucky mileage, and of values heretofore paid on tangible and intangible property in Kentucky, used in each of the above calculations, are the correct figures, respectively, for the times involved, of the defendant, Southern Railway Company, and the lines owned, operated, leased and controlled by it, and the corresponding figures for the Cincinnati, New Orleans and Texas Pacific Railway Company are also correct.

5. During each of the years in question, the assessing authorities of the State of Kentucky—the State Tax Commission—uniformly, systematically and intentionally assessed the franchise tax of all common carriers having [fol. 410] lines within and without the State of Kentucky upon the following basis, to-wit:

The carrier's railway system was deemed to include the lines owned, operated, leased or controlled by it, and whereever the carrier owned a majority of the capital stock of another carrier, such ownership of stock was deemed to constitute the second carrier as being owned by the first; that the net railway operating income of the carrier and of the lines owned, operated, leased and controlled by it—taxes, hire of equipment and joint facility rents being deducted—was capitalized at 7%; that there was then deducted the total excess values outside of the State of Kentucky of the carrier proposed to be assessed, and of the lines owned, operated, leased or controlled by it; there was then assigned to Kentucky the proportion that the number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky bore to the total number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky and elsewhere. The proportion thus assigned to Kentucky was equalized at 75% for the taxing year 1918, and equalized at 85% for the taxing year 1919, that from this equalized value assigned to Kentucky, there was then deducted the assessed value of the tangible property and the balance was deemed the value of the carrier's franchise on which a franchise tax was based.

6. During each of the years in question the Director General of Railroads, under the Acts of Congress duly passed, had taken possession and control of and was operating all of the railroads and railroad property of the defendant, Southern Railway Company, and of the lines owned, op- [fol. 411] erated, leased or controlled by it, and said Director General of Railroads for each and all of the years involved herein made and filed proper reports as provided by Kentucky Statutes for the Southern Railway Company in Kentucky, The Cincinnati, New Orleans and Texas Pacific Railway Company, the Mobile and Ohio Railroad Company, The Cumberland Railroad Company and the Cumberland Railway Company, and on each of said reports the Board made assessments, the amount of which is set out in the answer to the amended statement herein, and taxes thereon were paid by the Director General.

7. The additional assessment proposed by the amended statement is based on figures and calculations which exclude entirely all figures of every kind of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company.

8. Excluding from all consideration the Mobile and Ohio Railroad, the Cumberland Railroad Company and the Cumberland Railway Company, the following figures are correct:

1917	(a) The Kentucky mileage of the Southern Railway Company in Kentucky was..................	127.62
	Including trackage rights, the mileage was..........................	165.78
	(b) The Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific Railway Company was...	197.50
	(c) The total mileage within and without the State was..........	8,914.22

The total mileage within and without the State of Kentucky of 8,914.22, includes trackage rights. The total trackage rights so included are 564.06 miles. Of this 37.01 miles are within Kentucky, and 527.05 miles are outside of the State of Kentucky.

[fol. 412]

(d) The net railway operating income was	$33,673,556.09
(e) The excess tangible value without the state was	$62,868,941.86
1918 (a) The Kentucky mileage of the Southern Railway Company in Kentucky was	127.62
Including trackage rights, the mileage was	165.78
(b) The Kentucky mileage of The Cincinnati, New Orleans and Texas Pacific Railway Company was	197.50
(c) The total mileage within and without the State was	8,923.94

The total mileage within and without the State of Kentucky of 8,923.94, includes trackage rights. The total trackage rights so included are 553.98 miles. Of this 37.01 miles are within Kentucky, and 516.97 miles are outside of the State of Kentucky.

(d) The net railway operating income was	$35,821,133.69
(e) The excess tangible value without the State was	$76,196,015.35

9. The exhibits on pages 217a, 217b, 217d, of the printed record in the United States Supreme Court are correct for the items they purport to represent.

L. W. Morris, D. L. Hazlerigg, J. P. Hobson, Attorneys for Plaintiff. Edward P. Humphrey, Charles W. Milner, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 413] In Circuit Court of Woodford County

[Title omitted]

Amendment to Amended Statement—Filed Nov. 2, 1928

The Plaintiffs amend their amended statement heretofore filed to correct a clerical error therein and strike out the word against in the fourth line thereof from the beginning and insert in lieu thereof the words by reason of, so that said line shall read "claim for taxes by reason of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company." The plaintiffs say that the word against was used therein by clerical error for by reason of. Plaintiffs pray judgment as in said amended statement and for all proper relief.

L. W. Morris, D. L. Hazlerigg, J. P. Hobson, Attorneys for Plaintiff.

J. P. Hobson says he is one of the attorneys for plaintiff and believes the above to be true.

J. P. Hobson.

Subscribed and sworn to before me by J. P. Hobson this the 2nd day of November, 1928. C. A. Witt, Clerk.

[fol. 414] [File endorsement omitted.]

In Circuit Court of Woodford County

Commonwealth of Kentucky, etc., Plaintiff,

vs.

Southern Railway Company, etc., Defendants

Judgment—Nov. 2, 1928

This case being heard upon the whole record, and on plaintiff's motion that if an assessment was made, it should leave out the lines of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company, and should be calculated according to the basis shown by a tendered calculation which is made a part of this order "X", and the Court being advised, is of the opinion that the opinion of the United States Supreme Court only determined that the assessment was, under the record as it stood, arbitrary and excessive, and does not adjudge that a proper assessment can not be made under the record as it now stands, and the Court being of further opinion that on the whole record lines in Kentucky as a whole made large net earnings and were fairly representative of the system for the years in question, and [fol. 415] that therefore under the Statute the milage basis should be applied,

It is therefore considered, ordered and adjudged that for the fiscal year beginning July 1, 1917, a part of the franchise of the defendant, Southern Railway Company, was omitted from assessment, and that the part so omitted from assessment was of value $1,730,090.00, and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1918.

Said value of $1,730,090.00 is arrived at on the following calculation and basis, which includes the lines of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company:

Year Ended June 30, 1917, on Which Taxes for the Year 1918 Were Based

Net railway operating income, Southern Ry. Co., Va., and owned, operated, leased and controlled roads		$31,806,408.49
Net railway operating income, C., N. O. & T. P.		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
Deduct:		
Total outside excess tangible values, i. e., shops, terminals, and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
Total outside excess tangible values, i. e., shops, terminals, and double tracks, C., N. O. & T. P.	1,019,582.15	
		68,851,913.86
Deduct total tangible outside values, we have		$456,530,007.57
Entire mileage, Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,761.36	
Entire mileage, C., N. O. & T. P.	337.27	
	10,098.63	

[fol. 416] Ky. mileage, Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.14	
Ky. mileage, C., N. O. & T. P.	197.50	
	424.64	
Proportion Ky. to total mileage 4.209%—4.209% of $456,530,007.57 gives total value in Ky.		$19,215,348.02
Equalized at 75%		$14,411,511.02
Values heretofore paid on tangible and intangible property in Ky. by Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,053.00	
Values heretofore paid on tangible and intangible property in Ky. by C., N. O. & T. P.	9,181,368.00	
		12,681,421.00
Omitted value Southern Ry. Co., Va., franchise in Ky.		$1,730,090.02

Said assessment is at the rate of $5,334.55 per mile on the Kentucky mileage of the Southern Railway Company in Kentucky, and on the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific Railway Company.

County taxation will be in the following counties on the basis of the mileage therein as below set out:

Jefferson County	21.387	miles
Shelby County	24.299	"
Anderson County	20.092	"
Woodford County	21.185	"
Kenton County	14.37	"
Boone County	9.13	"
Grant County	22.45	"
Harrison County	2.43	"
Scott County	29.81	"
Fayette County	22.086	"
[fol. 417] Jessamine County	15.94	"
Mercer County	30.189	"
Boyle County	12.42	"
Lincoln County	23.83	"
Pulaski County	30.99	"
McCreary County	23.71	"

It is further considered, ordered and adjudged by the Court that for the fiscal year beginning July 1, 1918, a part of the franchise of the said Southern Railway Company was omitted from assessment, and that the part so omitted was of value $3,028,592.00, and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1919.

Said value of $3,028,592.00 is arrived at on the following calculation and basis, which includes the lines of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company:—

Year Ended December 31, 1918, on Which Taxes for the Year 1919 Were Based

Net railway operating income Southern Ry. Co., Va., and owned, operated, leased and controlled roads		$32,969,380.58
Net railway operating income C., N. O. & T. P.		3,047,946.55
		$36,017,327.13
Capitalized at 7%		$514,533,244.71
Deduct:		
Total outside excess tangible values, i. e., shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated and controlled roads	$80,160,065.06	
[fol. 418] Total outside tangible values, i. e., shops, terminals and double tracks C., N. O. & T. P.	$2,046,735.53	
		82,206,800.59
Deduct total tangible values, we have		$432,326,444.12
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,601.83	
Entire mileage C., N. O. & T. P.	337.27	
	9,939.10	

Ky. mileage Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.11	
Ky. mileage C., N. O. & T. P.	197.50	
	424.61	
Proportion Ky. to total mileage, 4.273%—4.273% of $432,326,444.12 gives total value in Ky.		$18,473,308.96
Equalized at 85%		$15,702,312.62
Values heretofore paid on tangible and intangible property in Ky. by Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky. by C., N. O. & T. P.	9,173,208.00	
		12,673,720.00
Omitted value Southern Ry. Co., Va., franchise in Ky.		$3,028,592.62

Said assessment is at the rate of $9,338.34 per mile on the Kentucky mileage of the Southern Railway Company in Kentucky, and on the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific Railway Company.

County taxation for said fiscal year will be in the counties and on the basis of the mileage therein for the fiscal year beginning July 1, 1917, above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning [fol. 419] respectively on July 1, 1917, and July 1, 1918, the defendants, Southern Railway Company and John C. Davis, Director General of Railroads, shall pay a penalty of twenty per cent (20%) on the amount of said State and County taxes on said omitted assessment under this judgment, which shall be collected and accounted for as other taxes.

As compensation for his services, Frank Bohannon, as Sheriff of Woodford County, the relator, herein is adjudged in both cases entitled to seventy-five per cent (75%) of the twenty per cent (20%) penalty herein before adjudged to be paid on said State and County taxes. Said defendants shall pay the total twenty per cent (20%) penalty on all State and County taxes to the Auditor of Public Accounts and said Auditor shall pay seventy-five (75%) per cent thereof to said Frank Bohannon.

Louis Morancy as County Attorney of Woodford County was present and assisted in the trial of these proceedings and he is allowed in both cases as compensation for his services, fifteen per cent (15%) of the amount of said State and County taxes. Said fifteen *per* (15%) per cent of the State taxes shall be paid to him by the Auditor when said taxes are paid. Said fifteen per cent of the County taxes shall be paid to him by the Sheriff of the respective counties when he collects said taxes and the remaining eighty-five per cent (85%) shall be paid by the Sheriff of the County.

It is further adjudged by the Court that the Clerk of the Woodford County Court shall enter in the book kept by him for that purpose, this judgment and he shall certify [fol. 420] the assessment hereby made by the Court of the part of said franchise omitted as aforesaid and its value, as herein fixed, to the Auditor of Public Accounts, and the apportionment, to the County Clerk, and the Sheriff of each of the Counti-s above named.

It is further adjudged that in each of these actions the plaintiff recover his costs and may have execution, etc.

To so much of the judgment as includes the lines of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company, the plaintiff objected and excepted. The defendants objected and excepted to each and every part of said judgment and prayed an appeal to the Court of Appeals which is granted.

The plaintiff expressly waived the execution of a supersedeas bond and agreed that no steps would be taken pending the appeal granted herein to enforce this judgment.

Seen.

J. P. Hobson, for Plaintiff.

Have seen.

Edward P. Humphrey, Charles W. Milner, Humphrey, Crawford & Middleton, for Defendants.

Exhibit "X" filed with the judgment and made a part thereof is in words and figures as follows, to-wit:

1917

Mileage in Kentucky of Southern R. R.	165.78
" of Cincinnati, N. O. & T. P.	197.50
	363.28
Total mileage of system	9,601.83
Less M. & O. and Cumberland	1,184.41
	8,417.42
Percentage in Ky. 8,417.42 into 363.2800 =	4.075

[fol. 421] Total net income	$33,676,536
Capitalized at 7%	481,050,801
Less excess outside values	62,868,941
Balance	418,181,860
Kentucky percentage 4.075	17,040,910
Equalized at 75%	12,780,683 08
Less assessments made	11,318,440
Balance omitted	1,482,243

1918

Total net income	$35,821,133
Capitalized at 7%	511,730,481
Less excess outside values	76,196,015
Balance	435,534,466
Kentucky percentage 4.075	17,726,252
Equalized at 85%	15,367,314
Less assessments	11,312,260
Balance omitted	3,755,034

Said Exhibit marked "X" is endorsed as follows, to-wit: Paper marked "X" filed with judgment and made part thereof. Attest: C. A. Witt, Clerk.

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD AND STIPULATION—Filed Nov. 28, 1928

[fol. 422] By agreement the Clerk is directed to copy on this appeal to the Court of Appeals all pleadings, stipulations, motions and orders filed since the issuance of the mandate of the Court of Appeals following the decision of the Supreme Court of the United States and also the judgment rendered herein since said time.

The parties also agree that the following order should be entered in the Court of Appeals:

On the joint motion of the parties hereto it is ordered that the records in the cases of Southern Railway Company v. Commonwealth, reported in 193 Ky. 474, and Commonwealth v. Southern Railway Company, reported in 204 Ky. 388, be placed with this record on this appeal and made part thereof.

L. W. Morris, D. L. Hazlerigg, J. P. Hobson, Attorneys for Plaintiffs. Edward P. Humphrey, Charles W. Milner, Humphrey, Crawford & Middleton, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 423] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 424] IN COURT OF APPEALS OF KENTUCKY

SOUTHERN RAILWAY COMPANY and ANDREW W. MELLON, Director General of Railroads, Appellants,

v.

COMMONWEALTH OF KENTUCKY, by ROBERT HAWKINS, Sheriff of Woodford County, Appellee

STATEMENT OF APPEAL—Filed Mar. 23, 1929

1. The parties to this appeal are as shown in the caption hereof.

2. The judgment herein appealed from was rendered on November 2, 1928, and may be found on pages 61, 62, 63, 64, 65, 66 and 67 of the record.

3. Judge J. P. Hobson, Mr. L. W. Morris, and Mr. D. L. Hazelrigg, all of Frankfort, Kentucky, are the Attorneys for the Appellee.

4. Appellants do not wish to have any summons issued.

(Signed) Edward P. Humphrey, Charles W. Milner, Humphrey, Crawford & Middleton (of Louisville, Kentucky), Attorneys for Appellants.

[fol. 425] IN COURT OF APPEALS OF KENTUCKY

AGREEMENT RE RECORD ON APPEAL—Filed Mar. 23, 1929

On the joint motion of the parties hereto it is ordered that the records in the cases of Southern Railway Company v. Commonwealth, reported in 193 Ky. 474, and Commonwealth v. Southern Railway Company, reported in 204 Ky. 388, be placed with this record on this appeal and made part thereof.

(Signed) Edward P. Humphrey, Chas. W. Milner, Humphrey, Crawford & Middleton, Attorneys for Appellants. (Signed) L. W. Morris, D. L. Hazelrigg, J. P. Hobson, Attorneys for Appellee.

[fol. 426] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRIES—April 8, 1929

Came the appellants by counsel and filed statement and motion for an oral argument; which motion is submitted.

Came appellee by counsel and filed motion to advance and statement joining in appellants' motion for an oral argument; which motion is submitted.

IN COURT OF APPEALS OF KENTUCKY

ORDER ADVANCING CASE, ETC.—April 10, 1929

The Court being sufficiently advised, the motion of appellants for oral argument, concurred in by appellee, is sustained and oral argument set for Friday May 3rd, 1929, at ten o'clock A. M.

It is further considered that the motion of appellee to advance be and the same is sustained and case advanced for hearing.

[fol. 427] IN COURT OF APPEALS OF KENTUCKY

ORDERS REASSIGNING CASE

April 16, 1929.

The Court being sufficiently advised, it is ordered that the oral argument originally set for May 3rd 1929 be postponed to Friday, May 24th 1929 at 10 o'clock A. M.

May 3, 1929.

It is ordered that this case be continued and set for oral argument early in the next term of this Court, the date to be fixed later.

Sept. 18, 1929.

The Court being sufficiently advised, the above case is set for oral argument for Tuesday, September 24th, 1929, at ten o'clock A. M.

[fol. 428] Sept. 24, 1929.

On the Court's motion, it is ordered that this case be reassigned for oral argument and argument set for October 22, 1929, at ten A. M.

Oct. 18, 1929.

It is ordered that the oral argument in this appeal be reassigned and set for November 26, 1929, at ten A. M.

IN COURT OF APPEALS OF KENTUCKY

ARGUMENT AND SUBMISSION—Nov. 26, 1929

This case coming on to be heard was argued orally by Hon. Edward P. Humphrey for the appellants and by Hon. Leslie W. Morris for the appellee, and submitted.

[fol. 429] IN COURT OF APPEALS OF KENTUCKY

JUDGMENT—March 27, 1931

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court. Whole Court sitting.

It is further considered that the appellee recover of the appellant its costs herein expended.

[fol. 430] IN COURT OF APPEALS OF KENTUCKY

SOUTHERN RAILWAY COMPANY and DIRECTOR GENERAL OF RAILROADS, Appellants,

v.

COMMONWEALTH OF KENTUCKY ON RELATION, ETC., Appellee

Appeal from the Woodford Circuit Court

OPINION OF THE COURT BY CHIEF JUSTICE LOGAN, AFFIRMING—March 27, 1931

On March 8, 1920, the Commonwealth of Kentucky on relation of its then revenue agent filed two statements, or petitions, in the County Court of Woodford County seeking to have assessed as omitted property a part of the franchise value of the Southern Railway Company which, it was alleged, had been omitted in the assessments made by the taxing authorities of the State of Kentucky. The first statement covered the years 1915, 1916 and 1917. The second statement covered the years 1918 and 1919. Apparently the reason for the separate statements was that the [fol. 431] railroads of the Nation had been placed in the hands of a director general who was in charge of their operation for the last two mentioned years. By stipulation the two cases were heard together in the county court, and that court dismissed the petitions, or statements, which was a finding that the Commonwealth was not entitled to recover. This was done after the pleadings had been made up and proof had been heard. There was an appeal to the Circuit Court of Woodford County, and, upon hearing, that court dismissed the petitions and an appeal was prosecuted to the Court of Appeals of Kentucky.

The cases had been consolidated and heard together in the lower court, and they were likewise considered and disposed of by one opinion in the Court of Appeals. See Comlth. by Etc. v. Southern Railway Company, 193 Ky. 474, 237 S. W. 11. It was insisted in that case by the Southern Railway Company that it could not be held responsible for any taxes that might be due, or that were not paid by the Southern Railway Company in Kentucky, a separate corporation, or for any taxes that might be due or assessable against the Cumberland Railway Company, the Cumberland Railroad Company or the Mobile and Ohio Railroad Company. It was the theory of the Commonwealth that these three railroad companies operating lines of railway in Kentucky were railroads controlled by the Southern Railway Company, and, therefore, should have been considered as a part of its system under the provisions of section 4077-4091 Ky. Stats. It was the contention of the Commonwealth that the Southern Railway Company should have reported to the Kentucky taxing authorities as required by these sections, and that after ascertaining the value of the entire system, including the [fol. 432] four roads mentioned having their situs in Kentucky, there should have been an apportionment to Kentucky on a mileage basis, and that that apportionment should be the proportion of the entire value of the Southern Railway Company subject to franchise tax represented by the ratio that the mileage in Kentucky bore to the Mileage of the entire system. The chief controversy was whether the Southern Railway Company should be required to pay taxes to the State of Kentucky because of these controlled roads within the State. It was held by this court that under the provisions of the sections of the Kentucky Statutes above cited the Southern Railway Company controlled the Southern Railway Company in Kentucky, and that the mileage held in that name should be treated as a part of the mileage of the Southern Railway Company, and that the assessment should have been made on that basis. As the assessment had not been so made this court directed such an assessment to be made, and that the Southern Railway Company should receive credit by the amount of franchise tax which had been previously paid on the assessment made against the Southern Railway Company in Kentucky. This court found, however, that the Mobile & Ohio Railway Company, the Cumberland Railway Company and the Cumberland Railroad Company should not be treated as a part of the system of the Southern Railway Company as there was no physical connection or unity of use between the properties of the Southern Railway Company and either of the other companies. The case was remanded to the circuit court with directions that it proceed to ascertain the amount of intangible property which should be assessed for each of the years according to the prevailing rule of law upon the subject.

[fol. 433] The prevailing rule of law was to be found in the Statutes above cited, the opinions of this court and the opinions of the Supreme Court of the United States.

On that appeal nothing was decided by this court other than the liability of the Southern Railway Company to assessment according to the laws provided for the assessment of railroads. It had not made a report to the taxing authorities of Kentucky as required by Statutes, and it defended its failure to do so on the ground that it could not be held responsible, in any way, for taxes assessed against the Southern Railway Company in Kentucky, and that it could not be required to make a report to Kentucky because it controlled that road. It made the same contention as to the other three railroads. The court sustained its contention as to the other three railroads but found against it as to the Southern Railway Company in Kentucky. When the Court remanded the cases for further proceedings consistent with the opinion there was nothing left to be done except for the Southern Railway Company to make a report as required by the Statutes including as a part of its mileage that of the Southern Railway Company in Kentucky. No question had arisen about the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company because the Commonwealth did not know that it was a railroad controlled by the Southern Railway Company. No report had been made up to that time by the Southern Railway Company showing that it controlled lines of railroad in the State of Kentucky. That it controlled the C. N. O. & T. P. Railway Company was a fact [fol. 434] not developed up to the time that the matter was remanded to the Circuit Court of Woodford County. The Southern Railway Company in Kentucky had made a separate report to the taxing authorities and had been assessed thereon. The C. N. O. & T. P. Railway Company had likewise made a report and had been assessed. These railroads had not been assessed as a part of the Southern Railway System. Therefore, the Southern Railway Company had failed to comply with the law in making its reports, or rather in its failure to make a report. The Commonwealth was not contending that the Southern Railway Company should pay taxes on a basis different from other railroad companies in the State, but was making the contention that it should be assessed for taxation on the same basis as other railroads.

When the case was again taken up in the circuit court the Southern Railway Company filed an amended answer on May 20, 1922. This amended answer first dealt*h* with the years 1915, 1916, 1917. It was alleged that the Southern Railway Company in Kentucky had no physical connection with the lines of the Southern Railway Company, and that the nearest point to the Southern Railway Company in Kentucky where the Southern Railway Company owned, operated, leased or controlled a line of railway was Harriman Junction, Tennessee, on the line of the Cincinnati, New

Orleans & Texas Pacific Railway Company, 141.8 miles south of Danville, Kentucky, and that the only other point of the last mentioned railway company where the Southern [fol. 435] Railway Company owned, operated, leased or controlled any line of railroad was at Chattanooga, Tennessee 221.5 miles south of Danville, Kentucky. It was alleged that the Southern Railway Company during the years mentioned above did not either directly, or indirectly, own, operate, lease or control the Cincinnati, New Orleans & Texas Pacific Railway Company, and that the only arrangement for the years mentioned under which the last mentioned railroad company handled traffic for the Southern Railway Company was the same arrangement as existed between any independent connecting carrier, that is on an established basis of division of rates and fares as a connecting carrier. The amended answer then dealt with the Mobile & Ohio Railroad Company and alleged that it was operated under its own management as an entirely independent line. The amended answer then set out the railway operating income of the Southern Railway Company in Kentucky for each of the above mentioned years. The mileage of the Southern Railway Company in Kentucky, including trackage rights, was 164.64 miles, 239.19 miles in Indiana and 162.89 miles in Illinois. The amended answer concluded with the allegation that the facts pleaded showed that it would be a violation of the Constitution of Kentucky and of the United States to assess against the Southern Railway Company any franchise tax for any of the years mentioned above, and that the effort to do so was an effort to bring into the State of Kentucky for purposes of taxation property not in Kentucky and values apper- [fol. 436] taining to property not in Kentucky and earnings derived from property not in Kentucky.

On the same day that the Southern Railway Company filed its amended answer the Commonwealth of Kentucky filed a reply to the amended answer which may be construed as a traverse of the allegations in the amended answer. On the same day there was a stipulation of facts agreed to by the parties. This stipulation is in ten paragraphs and relates to the business relationship between the Southern Railway Company and the Southern Railway in Kentucky, the Mobile & Ohio Railroad Company and the Kentucky and Indiana Terminal Railroad Company at

Louisville, and the Terminal Company at East St. Louis. The tenth paragraph in the stipulation is to the effect that the Southern Railway Company owned terminals, shops and double tracks outside the State of Kentucky constituting an excess valuation for 1914 of $43,699,232.53 for 1915 of the value of $49,639,400.79, and for 1916 of $55,260,111.19. It was further stipulated that the traffic manager of the Cincinnati, New Orleans & Texas Pacific Railroad Company and the Mobile & Ohio Railroad Company would state that the traffic affairs of these railroad companies were as separate and distinct from those of the Southern Railway Company and administered as independently thereof as those of the Illinois Central Railroad Company, or the Louisville & Nashville Railroad Company.

In the suit to recover taxes claimed for the years 1917 and 1918 the Southern Railway Company filed an amended answer on the 20th day of May 1922. In this amended [fol. 437] answer it was admitted that the Southern Railway Company controlled the Cincinnati, New Orleans and Texas Pacific Railway Company through stock ownership, and that it had so controlled it since January, 1917. It was alleged that for the year ending June 30, 1917, the railway operating income of the Southern Railway Company and the lines owned, operated, leased and controlled by it and by the Cincinnati, New Orleans & Texas Pacific Railway Company was $36,776,734.50; that the proportion of the mileage in Kentucky of the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition and including the mileage in Kentucky of the Cincinnati, New Orleans & Texas Pacific Railway Company to the total mileage of the lines owned, operated, leased and controlled by the Southern Railway Company including the mileage of the Cincinnati, New Orleans & Texas Pacific Railway Company was 4.209%; that for the year ending June 30, 1917 the Southern Railway Company had on its lines outside of Kentucky double tracks, shops, terminals, etc., of the value of $67,832,331.71; that none of the lines in Kentucky of any of the roads mentioned in the petition had any such double tracks, shops or terminals; that the Cincinnati, New Orleans & Texas Pacific Railway Company had outside of Kentucky double tracks, shops and terminals of the excess value of $1,019,582.15 over and above any double tracks, shops or terminals which it had inside of the State of Kentucky. It was alleged that for the year ending June 30, 1917, the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition including the Cincinnati, New Orleans [fol. 438] & Texas Pacific Railway Company filed with the Kentucky State Railroad Commission, the State Board of Valuation and Assessment, and the State Tax Commission of Kentucky full reports showing the result of all the operations of each of the lines of railroad as required by Statute and each company paid the full tax assessed on its tangible and intangible property, that for the year mentioned, the Cincinnati, New Orleans & Texas Pacific Railway Company paid to the State of Kentucky a franchise tax on a franchise valuation of $9,181,368.00, and that the other railroads in Kentucky mentioned in the petition paid taxes on a franchise valuation of $3,500,053.00.

It is alleged that for the year ending December 31, 1918, the railway operating income of the Southern Railway Company and of the Cincinnati, New Orleans & Texas Pacific Railway Company was $36,017,327.13; that the proportion of the mileage in Kentucky of the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition including the mileage in Kentucky of the Cincinnati, New Orleans & Texas Pacific Railway Company to the total mileage of the lines owned, operated, leased and controlled by the Southern Railway Company including the mileage of the Cincinnati, New Orleans & Texas Pacific Railway Company was 4.273%; that for the year ending December 31, 1918, the Southern Railway Company had on its lines outside of Kentucky double tracks, shops, terminals, etc., of the value of $80,160,065.06 [fol. 439] (printed in amended $8,160,065.06); that none of the railroads mentioned in the petition in Kentucky had any such double tracks, shops, terminals, etc.; that the Cincinnati, New Orleans & Texas Pacific Railway Company had outside of Kentucky double tracks, shops, terminals, etc., of the excess value of $2,046,735.53, over and above the value of any double tracks, shops, or terminals inside of Kentucky. It was alleged that for the year ending December 31, 1918 the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition, including the Cincinnati, New Orleans & Texas Pacific Railway Company, filed with the Kentucky Railroad Commission, the State Board of Valuation and Assessment and the State Tax Commission of Kentucky full reports showing the result of all the operations of each of the lines of railroad as required by Statute, and that each company paid the full tax assessed on its tangible and intangible property; that for the year the Cincinnati, New Orleans & Texas Pacific Railway Company paid to the State of Kentucky a franchise tax on a franchise valuation of $9,173,208.00, and that the other roads in Kentucky mentioned in the petition paid taxes on a franchise valuation of $3,500,512.00. It was then alleged that it would be a violation of the Constitutional provisions in the State and Federal Constitutions to assess any additional property against either of the roads mentioned.

A reply was filed to the last amended answer which brought into the case no new element. Then followed an- [fol. 440] other stipulation of facts as applicable to the case for the purpose of a trial in the circuit court. It had been agreed that both of the cases should be heard together. This stipulation agreed that from January 1917 the executive and other officers of the Southern Railway Company were the corresponding officers of the Cincinnati, New Orleans & Texas Pacific Railway Company, and that there had been since that date unification and consolidation for supervision of operation of the Cincinnati, New Orleans & Texas Pacific Railway Company into the Southern Railway Company System; that the Cincinnati, New Orleans & Texas Pacific Railway Company owned and operated a line of railroad in the State of Kentucky 197.50 miles long which passed through certain mentioned counties. It was also agreed that it owned excess outside valuation of $1,019,582.15 for the year 1917, and $2,046,735.53 for the year 1918; that the net railway operating income was as pleaded in the last amended answer; that its total mileage for 1917 and 1918 was 337.27 miles both in and outside Kentucky, and that the additional mileage should be added to the system mileage of the Southern Railway Company; that for each of the years mentioned it reported to the State Tax Commission in its own name and was taxed on the basis of the assessment set out in the amended answer; that the Southern Railway Company owned terminals, shops, and double tracks outside of the State of Kentucky which constituted an excess valuation for 1917 of $80,160,065.06, and for the year 1918 of $81,845,408.72. It was agreed that for the year 1917 the property of all railroads in Kentucky was [fol. 441] equalized for taxation on a basis of 75%, and for 1918 on a basis of 85%.

This stipulation was a substantial admission of what was written into the judgment that was entered on the same day if the property of the railroad companies owning lines in Kentucky should be treated as a part of the Southern Railway Company System. No other construction can be placed upon that stipulation. On these facts the circuit court found that there should have been an assessment against the Southern Railway Company for the year ending June 30, 1915 of $972,662.00, as omitted porperty, and it was directed that for county taxation it be distributed among the counties on the basis of $7,669.75 per mile. For the year ending June 30, 1916 no additional assessment was made. For the year ending June 30, 1917, it was found that a part of the franchise of the Southern Railway Company was omitted from assessment, and that the part so omitted was of the value of $2,018,561, and it was assessed at that sum for State and county taxation. The assessment was ordered distributed among the counties where the property was subject to taxation on the basis of $15,916.99 per mile. For the year ending June 30, 1918 it was adjudged that a part of the franchise of the Southernn Railway Company was omitted from assessment and that the part so omitted was $1,730,090.00, and it was directed that that sum be assessed for State and county taxation, and that it be distributed among the counties on the basis of $5,334.55 per mile. For the year ending June 30, 1919 it was adjudged that a part of the franchise of the [fol. 442] Southern Railway Company was omitted from assessment, and that the part so omitted was of the value of $3,028,592.00, and it was ordered that it be assessed for State and county taxation, and that the assessment be distributed among the counties on the basis of $9,328.34 per mile. A 20% penalty was allowed in favor of the Commonwealth, ¾ of which was allowed the officers who prosecuted the action and the other ¼ to the Commonwealth itself.

That these assessments were correct was shown by the stipulation on which they were based. No question was left open except whether the lines in Kentucky were a part of the Southern Railway System, and probably the question of limitations. The usual method allowed by the Statutes and approved by this court and the Supreme Court were followed in seeking the assessments.

There was an appeal to the Court of Appeals, and, on June 13, 1924, this court handed down an opinion in which the judgment was reversed in so far as it made an assessment against the Southern Railway Company for the years 1914 and 1916, but the assessments made for the year 1917, that is for the year ending June 30, 1918 and the year ending June 30, 1919, was affirmed.

This court affirmed the judgment in so far as it made assessments for the years 1917 and 1918 without argument, or elaboration, because, as was stated, it was admitted that the assessments for these years were made in accordance with, and were concluded by, the former opinion. This [fol. 443] statement in the opinion shows that it was recognized that the circuit court had properly assessed the property for taxation for these years on the facts admitted in the stipulation considered as evidence in the case. The sole ground urged for reversal as to the other years was that for those years there was no such unity of use and operation between the lines of the Southern Railway owned, operated, leased or controlled in Kentucky and its lines outside of Kentucky as to permit the assessment of its franchise upon the theory that all of its owned and controlled lines in and out of the State constituted a single system. It was the contention that its line in Kentucky for these years had neither physical nor operative connection with the outside lines unless with its line running from New Albany, Indiana, to East St. Louis, Illinois, and, therefore, to apply the notion of unity to all of its lines under such circumstances would be a violation of the Fourteenth Amendment of the Constitution of the United States in that it would bring into Kentucky for taxation purposes values wholly outside of the State.

This court reversed the judgment directing an assessment against the Southern Railway Company for the years 1914 [illegible] 1916, not because there was not a physical connection between the lines of the Southern Railway Company and the lines of the Southern Railway Company in Kentucky, but because there was not such a unity of use as authorized an assessment of the properties of the Southern [fol. 444] Railway Company in Kentucky as a part of its system of mileage until January 1917 when the Southern Railway Company acquired control of the Cincinnati, New Orleans & Texas Pacific Railway and thereby unified all of its holdings into a single unit of use and management. In the opinion on the first appeal the court had under consideration only one question and that was whether the unifying facts shown by the record were such as to treat the lines of the four railroads in Kentucky owned, operated, leased or controlled by the Southern Railway Company as a part of its system mileage which required the Southern Railway Company to make a report to the taxing authorities of Kentucky, and to make necessary an assessment against that company the same as against other companies owning railroad lines both within and without the State of Kentucky. This court found that the unifying facts were such as to establish that the Southern Railway Company in Kentucky was an integral part of the Southern Railway Company requiring an assessment against the last mentioned company. But the court found that the facts were not sufficient to include in the mileage of the Southern Railway Company as a part of its system mileage the Cumberland Railroad Company, the Cumberland Railway Company and the Mobile & Ohio Railroad Company.

The only contention made in that case by the Southern Railway Company was that neither its ownership of a majority, or even all of the stock in the Southern Railway Company in Kentucky, nor its maintenance of an office in Kentucky for the purpose of soliciting and routing freight and passengers to their destination constituted doing business [fol. 445] in the State so as to render it liable for taxes sought to be imposed. That was the only question made at the time, or ever made. There was no pleading that the Southern Railway Company should not pay taxes in addition to those already erroneously paid because the lines of the Southern Railway Company in Kentucky were not as valuable mile for mile as the lines outside of Kentucky, or, to put it another way, that the line mile for mile of the Southern Railway Company in Kentucky was of less value than the average value of the lines mile for mile of the entire system. Such a question was not heard of or considered as there was nothing in the pleadings, proof or argument to suggest such a matter. It is true that there was evidence in the nature of an exhibit from which it might have been inferred that the Southern Railway in Kentucky was not a profitable branch of the Southern Railway Company. But that point was not raised on the first appeal. The first appeal decided against the contention which was made, that is, that the Southern Railway Company should make no report and pay no taxes to the State of Kentucky because of its control of the Southern Railway Company in Kentucky.

The mileage of the Cincinnati, New Orleans & Texas Pacific Railway Company was not considered at all in the first opinion of this court. That opinion did not affect any question involving the result flowing from the control of the Cincinnati, New Orleans & Texas Pacific Railway Company by the Southern Railway Company. Nothing was precluded by that opinion other than questions which were actually [fol. 446] before the court for decision, or which might have been raised on the record. The principles announced in that opinion applied alike to the control of the Cincinnati, New Orleans & Texas Pacific Railway Company, or any other lines controlled by the Southern Railway Company in Kentucky. The specific question decided in the first opinion was that three of the railroad companies mentioned in the petition should not be treated as a part of the Southern Railway Company for taxation purposes in the State of Kentucky and that the fourth should be so treated. Neither of the four railroad companies considered was the Cincinnati, New Orleans & Texas Pacific.

When the second appeal reached this court a different state of facts was presented in that it was shown that in January 1917 the Southern Railway Company had assumed control of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company. This record made it entirely clear that the Southern Railway Company in Kentucky was a part of the system of the Southern Railway Company because of its actual physical connection with the Cincinnati, New Orleans & Texas Pacific Railway Company which had become a part of the system mileage of the Southern Railway Company.

When this court affirmed the assessment made against the Southern Railway Company for the years 1917 and 1918, loosely speaking, it did so because of the fact that it was admitted that the assessment had been made in accordance with the principles announced in the former opinion. The former opinion had not instructed the circuit court ot [fol. 447] make an assessment in any particular manner. The direction was that the assessment should be made in the usual manner as required by the Statutes as construed by the courts. It was a simple matter and well understood by the attorneys representing the respective parties. No question had been raised by the amended answer filed after the case had been sent back to the circuit court other than that it was improper to treat the lines in Kentucky, that is the lines of the Cincinnati, New Orleans & Texas Pacific as a part of the system mileage of the Southern Railway Company for taxation. There was no plea to the effect that the lines of that company were more or less valuable mile for mile than the average value mile for mile of the entire system. The point, however, was not pressed as it was admitted that the assessment had been made as directed by the court in its former opinion which was, in effect, an admission that the assessment for the years 1917 and 1918 had been made in accordance with the provisions of the Statutes as construed by the courts.

In the opinion on the second appeal the court found, as in the opinion on the first appeal, that there was such a physical connection between the Southern Railway Company in Kentucky and the Southern Railway Company as would authorize the assessment of the mileage of the Southern Railway Company in Kentucky for the years prior to 1917, but that there was no such unity of use as [fol. 448] would authorize the assessment of the Southern Railway Company in Kentucky until it obtained control of the Cincinnati, New Orleans & Texas Pacific Railway Company in 1917. The effect, therefore, of the second opinion was that there could be no assessment for the years involved in the first opinion, or rather that as the facts were developed there could have been no assessment if there had been no change in the facts after tthe first opinion was rendered because there was no such untiy of use as would have authorized an assessment of the Southern Railway Company in Kentucky, and it necessarily would have followed that the assessment of the units in Kentucky separately was proper. This was prevented by reason of the new fact that was made to appear in the amended answer and in the stipulation. That is that the Southern Railway Company acquired control of the Cincinnati, New Orleans & Texas Pacific Railway Company in January 1917.

[fol. 449] Although the amended answer had set up the control of the Cincinnati, New Orleans & Texas Pacific Railway Company by the Southern Railway Company after the return of the case to the circuit court there was no amended petition asking an additional assessment by reason of the control of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company. That important fact evidently escaped the attention of the attorneys representing the Commonwealth. The circuit court entered a judgment pursuant to the stipulation and the judgment was admittedly correct for the years 1917 and 1918, and the assessments for these years were not called in question on the second appeal by any pleading or argument advanced by counsel for the Southern Railway Company. The only plea invoking the Fourteenth Amendment to the Constitution of the United States in connection with the Cincinnati, New Orleans & Texas Pacific Railway Company must be found in the amended answer filed on May 20, 1922 which related to the assessments for the years 1917 and 1918. The facts in relation to the Cincinnati, New Orleans & Texas Pacific Railway Company were fully set out in that amendment. It was then alleged that the Cincinnati, New Orleans & Texas Pacific Railway Company had made report to the taxing authorities of Kentucky for these two years, and that an assessment had been made against it. The invoking of the Fourteenth Amendment by that plea can be construed only to mean that it would be a violation of the Fourteenth Amendment to hold that the Cincinnati, New Orleans & Texas Pacific Railway Company was so controlled by the Southern Railway Company as to require [fol. 450] the Southern Railway Company to report to the taxing authorities of Kentucky for assessment of its properties in Kentucky, or that it would be violative of the Fourteenth Amendment to require an assessment of the properties of the Southern Railway Company when the Cincinnati, New Orleans & Texas Pacific Railway Company had made a report and had paid taxes on the assessment made against it as an independent unit. Neither of these points were pressed in the argument before the Court of Appeals on the second appeal, and there was no basis for any such contention on that appeal. No point was made based on the fact that the Commonwealth failed to amend its petition asking that there be an additional assessment because the Southern Railway Company had obtained control of the Cincinnati, New Orleans & Texas Pacific Railway Company in January 1917.

A petition for a rehearing, or modification, of the second opinion was filed by the Southern Railway Company and that petition raises no question directly or by inference, that the opinion was erroneous because there had been an assessment against it that was unfair or discriminatory because the mileage in Kentucky was not of equal value mile for mile with the system mileage. Only two grounds were urged for a rehearing, or modification. The first was that the judgment of the circuit court made an assessment against James C. Davis, Director General and the Southern [fol. 451] Railway Company for the years ending June 30, 1918 and 1919, when the assessment should have been made against James C. Davis, Director General, alone. The second ground was that the judgment assessing additional property for these two years fixed a penalty to be paid by both of the defendants upon the taxes due, and that no penalty should have been allowed. A reply was filed by the Commonwealth to the petition for a rehearing, or modification, and the Southern Railway Company filed a response wherein it was said:

> "It will be recalled that on petition for rehearing two points were made:
>
> 1. That the judgment for the years during which the railroad was being operated by the Director General should have been against that officer alone, and that the inclusion of the Southern Railway Company in this judgment was erroneous.
>
> 2. That no penalty could be assessed against the Director General."

No other objection was offered to the opinion of this court on the second appeal and the relief asked for in the petition for a rehearing and modification was denied by this court.

[fol. 452] In the assignment of errors preparatory to an appeal to the Supreme Court of the United States the

Southern Railway Company assigned four specific errors on which it relied. The first was that the assessment should have been against the Director General alone; the second was that the court erred in holding that the Southern Railway Company in Kentucky was in fact and in law the same as the Southern Railway Company; the third was that the court erred in holding that there was any such connection between the lines of the Southern Railway Company in Kentucky and the lines of the Southern Railway Company south of Danville, Kentucky; as justified the assessment of a franchise tax against the Southern Railway Company based upon the earnings of its system south of Danville, and in so holding there was imposed, in effect, a tax against the Southern Railway Company on account of property owned by it outside of the State of Kentucky, and that such an imposition of the tax was a violation of the Fourteenth Amendment of the Constitution of the United States; and the fourth was that the court erred in holding that a penalty should be adjudged against the Southern Railway Company for failure to assess its property during the years in controversy when the property was at the time in the control of the Director General.

It will be observed that in the assignment of errors there was no complaint in respect of the value of the mileage of [fol. 453] the Southern Railway Company in Kentucky, and there was no reference to the Cincinnati, New Orleans & Texas Pacific Railway Company at all. For the first time counsel for appellant appear to have gone back to the petitions and amended petitions and ascertained that no assessment was sought against the Southern Railway Company because of its control of the Cincinnati, New Orleans & Texas Pacific Railway Company.

Up to this time we have referred to the Southern Railway Company alone as there was no conflict between the interest of that company and the Director General and where we have referred to the Southern Railway Company for the years 1917 and 1918 the reference was to the Director General as well. The Director General, however, filed a separate assignment of errors. Two additional errors were alleged in his assignment. One that the court erred in holding that there was any such connection between the properties of the Southern Railway Company in Kentucky and the properties of the Southern Railway Company south of Chattanooga by reason of assumed connection of the properties of the Southern Railway Company in Kentucky at Danville and the properties of the Southern Railway Company at Chattanooga through the properties of the Cincinnati, New Orleans & Texas Pacific Railway Company extending from Danville to Chattanooga, as justified the as- [fol. 454] sessment of a franchise tax against the Southern Railway Company based upon the earnings of its system south of Danville, and that the effect of making such an assessment was to impose a tax against the Southern Railway Company on account of property owned by it outside of the State of Kentucky. The other additional error was that the court erred in approving an assessment of the franchise of the Southern Railway Company by taking into consideration the earning of its property south of Chattanooga because to do so was to make an assessment in Kentucky of property outside of the State of Kentucky.

In neither of the assignments was there any reference to the earnings, or value, of the lines of railroad in Kentucky controlled by the Southern Railway Company.

The opinion of the Supreme Court reversed the case not on account of either of the errors assigned, but on two grounds which it is necessary to notice for the purpose of ascertaining whether the contention for the Commonwealth has any basis on which to rest. It was found by the Supreme Court that the Court of Appeals rightly adjudged that a State may tax property permanently within its jurisdiction belonging to one domiciled elsewhere and [fol. 455] used to carry on commerce among the States. It was said, in effect, by the Supreme Court that the Court of Appeals had rightly found that where property is a part of a system and has its actual use only in connection with other parts of the system that that fact may be considered although other parts of the system are outside of the State; that the Court of Appeals was right in finding that a State may not tax property outside of its jurisdiction belonging to one domiciled elsewhere, and that the mileage basis of apportionment could not be adopted in taxation of railroad franchises, where the result is shown to be arbitrarily excessive.

Having found that the Court of Appeals correctly declared the principles the question before the Supreme

Court, so it was said by that court, was whether the State made valid application of the governing principles. That court said without elaboration, or explanation:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans, & Texas Pacific."

It was said that that company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky, and that the taxes so paid were based on values per mile in excess of average value per [fol. 456] mile for the system arrived at by capitalization of net railway income in accordance with the method applied by the State. Then followed this statement:

> "No part of the amounts adjudged to have been omitted could properly be assigned thereto."

We are left in doubt as to whether the Supreme Court meant that no part of the amounts adjudged to have been omitted could properly be assigned to the Cincinnati, New Orleans & Texas Pacific Railway Company because there was no claim of any taxes in respect of the lines of that company, or that no part of the amounts could properly be assigned thereto because that company had reported and paid taxes on its property as indicated. The Supreme Court had well stated the method of assessing property by the taxing authorities in the State of Kentucky pursuant to the Statutes as construed by this court and the Supreme Court of the United States. That court knew that under the Statutes as so construed the assessment of property against a railroad company always resulted in distributing the taxes based thereon over all of the lines of the railroad on the mileage basis. It appears to us, therefore, that, construing the opinion of the Supreme Court in the light of the construction placed upon the Statutes of this [fol. 457] State by the Court of Appeals and that court itself, the meaning of what was said was that none of this additional assessment could be apportioned to the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company because there was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company.

When the Supreme Court reached that conclusion it followed that the taxes based on the additional assessments must necessarily be distributed over the lines of the Southern Railway Company in Kentucky, and that such an assessment for distribution over its lines would be such an increase as to show that the assessment was excessive and arbitrary. Undoubtedly the Supreme Court was correct in holding that these increased assessments could not be justified if they were based alone on the mileage of the Southern Railway Company in Kentucky. The values had been drawn into Kentucky not alone by reason of the mileage of the Southern Railway Company in Kentucky, but because the mileage of the Cincinnati, New Orleans & Texas Pacific Railway Company had been considered in arriving at the apportionment unfit. In fact the mileage in Kentucky of the Mobile & Ohio, the Manchester Railroad Company and the Manchester Railway Company had also been used in arriving at the proper apportionment unit on the mileage basis. It is true, nevertheless, that it was an assessment against the Southern Railway Com-[fol. 458] pany and regardless of whether the taxes were distributed over the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company and the lines of the Southern Railway in Kentucky made not the slightest difference in the amount that must be paid by the Southern Railway Company. But as there was no claim for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company the mileage of that company should not have been considered in arriving at the apportionment unit on the mileage basis. Clearly that was the basis of the decision of the Supreme Court that the assessment as made brought into Kentucky values that could not be properly allocated to the State.

If the question had been raised by proper pleadings, or had been brought to the attention of the Court of Appeals in a proper manner when considering the second appeal, doubtless this court would have reached the same conclusion on the point as was reached by the Supreme Court.

The other reason for reversal given by the Supreme Court was that the apportionment unit was not correctly arrived at. There can be no argument on that point. As indicative of what the Supreme Court meant in holding that the entire assessments were by reason of the mileage of the Southern Railway Company in Kentucky when it [fol. 459] said there was no claim for tax*ed* in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company we call attention to the language used by that court in its consideration of the methods followed in arriving at the apportionment unit on a mileage basis. The court said:

"And for the reasons stated the mileage of the Cincinnati, New Orleans & Pacific should not have been included."

As there was no claim for taxes in respect of the lines of that company it followed, as a matter of course, that the mileage owned by that company should not have been used to increase the proportion of the lines owned, operated, leased or controlled in Kentucky to the total mileage of the system. With that mileage omitted there is no room for argument that would sustain the assessments as made. Necessarily the enforcement of the taxes so assessed would violate the due process clause of the Fourteenth Amendment.

When the opinion of the Supreme Court was filed in the Court of Appeals that court directed a reversal of the judgment of the circuit court, and when the case was remanded to the circuit court the Commonwealth, perceiving [fol. 460] that it had made no claim for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company, filed an amended petition. The Southern Railway Company filed an answer and a reply was filed, additional stipulations were filed and a second amended petition correcting a clerical error in the first. In the first amended petition allegations were made at length showing that the Commonwealth was making claim for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company. The answer to that amended petition was a traverse and, in additional paragraphs, there were affirmative pleas not material as the stipulation took care of the facts. But the Southern Railway Company attempted to rely upon the opinion of the Supreme Court of the United States as a bar to any further right of action in the Commonwealth to seek a recovery of taxes against it. In another paragraph there was a plea of limitation on the ground that the amended petition was filed more than five years after the reports and assessments should have been made. A demurrer was sustained to the plea of limitation. The new stipulation of facts was substantially the same as the one used as a basis for the judgment of the circuit court immediately before the second appeal to the Court of Appeals. The case was submitted to the circuit court for judgment and the court rendered the same judg- [fol. 461] ment that had been previously entered, and the appeal now before us is from that judgment.

It is the contention of counsel for the Southern Railway Company that the opinion of the Supreme Court was based upon exactly the same facts that now appear of record. In view of what has been said in this opinion we cannot agree with that contention. In the amended petition which was filed making claim for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company a new question was presented. It cannot be said now that there is not any claim for taxes by reason of the control of the Cincinnati, New Orleans & Texas Pacific Railway Company. There is no question now about the right to consider the mileage of the Cincinnati, New Orleans & Texas Pacific Railway Company in arriving at the proper apportionment unit on a mileage basis. It cannot now be argued that the assessment has been made solely because of the lines of the Southern Railway Company in Kentucky and that the taxes imposed are because of the lines of that company alone.

The Supreme Court correctly pointed out that the proportion of mileage in Kentucky to the total system mileage was not correctly stated in the opinion of the Court of Appeals of Kentucky. That was true because no objection was made to the apportionment unit. When the case was before the circuit court for a final determination the Commonwealth, through its attorneys, attempted to eliminate [fol. 462] the mileage of the Mobile & Ohio Railroad Company, the Manchester Railroad Company and the Manchester Railway Company, and tendered a calculation showing the proper basis of apportionment with these roads eliminated. If the mileage in Kentucky should be eliminated the mileage outside of Kentucky also had to be eliminated. If the mileage of these railroads had been eliminated the result would have shown a less assessment for the year 1917, and a greater assessment for the year 1918, and, on the whole, the Southern Railway Company would have been the loser if the assessments should stand. Because of that the Commonwealth objected and excepted to so much of the judgment as included the mileage of these railroads. But there is no cross appeal. The Southern Railway Company excepted to the judgment as a whole, but if the exception on that point should be sustained it would result in a greater assessment for the two years, and a greater amount of taxes which would have to be paid by the Southern Railway Company than to allow the judgment to stand as it is. The appellants cannot complain.

With that out of the way we will give a little further consideration to the merits of the case. There had been much litigation over the assessments of railroad properties in Kentucky prior to the Kentucky Railroad Tax Cases decided by the Supreme Court in 1917. L. & N. R. R. Co. v. Green, 244 U. S. 522. Since that time there has been no litigation over the assessments of railroad property. The plan finally devised by the taxing authorities in conformity [fol. 463] with the opinion of the Supreme Court has been carried on without question either by the State, or the railroad companies. The capitalization of net income has generally been followed. There has been an effort to eliminate the excess values outside of Kentucky before making an apportionment of the values arrived at to Kentucky. The excess values were eliminated by the stipulation in this case. The assessment after the elimination of excess values outside of the State has been made on a mileage basis. Let us see what brought about the difficulty with the assessments made for the years 1917 and 1918. The Southern Railway Company control-ed the Southern Railway Company in Kentucky, and the Cincinnati, New Orleans & Texas Pacific Railway Company during these two years. It was the duty of the Southern Railway Company to make a report giving its total mileage for all roads owned, operated, leased or controlled and the net income from such roads. It failed to do that and allowed the two controlled roads mentioned to make separate reports. If the Southern Railway Company had made the reports as required by the Statutes and the same method of assessment had been pursued the assessments for the years mentioned would have been increased exactly by the [fol. 464] amount shown by the judgment of the circuit court as omitted values. The Southern Railway Company then would have paid taxes on that basis. No process of reasoning can escape the conclusion that the Southern Railway Company has not paid taxes for these two years on the same basis as other railroad property has been assessed for the same years. This was brought about through the failure of the Southern Railway Company to comply with the law. Some of the larger systems of railways operating in Kentucky own, lease, operate or control mileage that does not yield a large income, but, after eliminating the excess values outside of Kentucky, this mileage has been considered of equal value mile for mile with the other mileage of the system. To allow the Southern Railway Company to escape these additional assessments is to allow it to escape the payment to the State and counties affected of taxes undoubtedly just if the assessments of railroad properties in Kentucky for the last thirteen years have been correctly made, and that they have been correctly made is shown by the complete satisfaction of the railroad companies with the assessments so made. If the construction placed upon the opinion of the Supreme Court by counsel for the Southern Railway Company is the correct one then the entire system for the assessment of railway property in Kentucky is destroyed and confusion will prevail where there has been order and satisfaction. It is [fol. 465] because of the importance of the question and the consequences which would result from sustaining the contention of appellants that we have given to the opinion of the Supreme Court that careful attention which it deserves and have come to the conclusion that the opinion was based upon the idea that "there was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific."

As there was no claim for taxes in respect of the lines of that railroad, the lines should not have been considered in determining the values that should be apportioned to Kentucky as was found by the Supreme Court. The amended petition made claim for taxes in respect of the lines of that railroad.

Under the authority of Mutual Life Insurance Company v. Hill, 178 U. S. 347; Messenger v. Anderson, 225 U. S. 444; Wolfe Packing Company v. Industrial Relations, 267 U. S. 562, and the cases cited in these opinions we have reached the conclusion that a new state of facts is presented to us, and that the judgment of the circuit court should be affirmed unless it should be reversed on account of one or more of the collateral grounds relied on which we will now proceed to consider.

The first one of these collateral grounds is that the judgment for taxes should have been against the Director Gen- [fol. 466] eral of Railroads alone and not against the Southern Railway Company. Counsel cite the Act of Congress of March 21, 1918, U. S. Comp. Stats. Anno. Supp.; 1919-1923 Sec. 3115¾ et seq., 40 Stat. at large, 457. That act, according to its terms, prohibits any construction that will amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation except when such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds. So fas as the taxes due the State of Kentucky are concerned the Southern Railway Company must be held responsible. If it has any claim against the United States Government growing out of the payment of the taxes that is another matter.

The other collateral ground is that no penalty should be imposed on the Director General of Railroads. Section 4241 Ky. Stats. allows a penalty of 20 per centum on the amount of taxes due and cost of assessment except where the property shall have been duly listed by the owner thereof. Three-fourths of this penalty must be paid to the officers prosecuting the action to have the omitted property assessed. The one-fourth is part of the State Treasury. This property was not assessed because the Southern Rail- [fol. 467] way Company failed to make the reports required by the Statutes. Clearly it is a case where the penalty may be imposed. The State cannot compel the Government of the United States to pay the taxes, or the penalty, but it has a lien on the property which should have been assessed to secure the payment of the taxes. The Federal Control Act, supra, did not repeal, impair or affect the existing laws of the States in relation to taxation. Therefore, we do not agree with counsel for appellants that the Federal Act has the effect of preventing the assessment of the penalty against the owner of the property. The case of Missouri Pacific Railway Company v. Ault, 256 U. S. 554 relied on by counsel for appellants was not a tax case. The penalty therein considered was a penalty for the nonpayment of wages. The judgment for wages was for $50 and the penalty was for $390. The Supreme Court held that by whatever name it may be called, if the element of punishment clearly predominates and Congress has not given its consent that such suits may be brought against the United States there could be no penalty imposed against the Director General. Another case relied on by counsel for appellant is Norfolk-Southern Railroad Company v. Owens, 256 U. S. 565. That was a case where judgment had been [fol. 468] obtained against the railroad company for the amount of $21 because of undue delay in making delivery of an intrastate shipment. At the time the railroad was in the possession and control of the Government and operated by the Director General. The court followed the Ault case, supra, and held that no penalty could be imposed. The penalty assessed under the Statutes of Kentucky against delinquent tax payers is not one where the element of punishment predominates. The circuit court was not in error in allowing the penalty.

On the whole case we have reached the conclusion that the judgment should be and it is hereby affirmed.

Whole Court sitting.

Attys. for appellant: Edward P. Humphrey, Charles W. Milner; Humphrey, Crawford & Middleton, Louisville, Ky.

Attys. for appellee: Frank Daugherty, Atty. Gen.; L. W. Morris, D. L. Hazelrigg, J. P. Hobson, Frankfort, Ky.

[fol. 469] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—April 21, 1931

Came parties by counsel and filed joint motion for thirty days extension of time for appellant to file a petition for rehearing; which motion is submitted.

IN COURT OF APPEALS OF KENTUCKY

ORDER EXTENDING TIME—April 24, 1931

The Court being sufficiently advised, the motion of parties for thirty days extension of time for appellants to file petition for rehearing is sustained and time granted to and including June 5, 1931.

In Court of Appeals of Kentucky

Minute Entry—May 15, 1931

Came the appellant by counsel and filed a petition for rehearing and notice.

[fol. 470] Points and Authorities

Pages

1. The opinion of March 27, 1931, affirms exactly the same judgment which was reversed by the Supreme Court in 274 U. S. 76, and without any change in the facts or questions presented 474

2. This court based its opinion largely upon the idea that the defendant had not in the trial court or previous appeals presented the point that the assessment complained of resulted in bringing into Kentucky for taxation property and values outside of Kentucky in violation of the Federal Constitution, when 474

    (a) This defense was pleaded in the original answer.

    (b) The constitutional question was expressly passed on adversely to appellants in the first opinion of this court, in 193 Ky. 474-488. The question could not therefore be raised in this court.

    Hopkins v. Adams-Roth Gro. Co., 105 Ky. 357.

    (c) The Supreme Court held that this constitutional point had been pleaded and passed on by this court adversely to appellants. 274 U. S. 76-78.

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3. The Supreme Court did not reverse the case be- [fol. 471] cause there was any defect of pleading with respect to the C. N. O. & T. P. The Supreme Court reference to the C. N. O. & T. P. was that that road had paid taxes on mileage values in excess of the system value . 475

4. All facts were stipulated in the prior appeal. Under the decisions of this court and of the Supreme Court a stipulation takes the place of both pleadings and proof 476

   Saltonstall v. Russell, 152 U. S. 628.
   In Re Blake, 150 Fed. 279.
   Lincoln County Bd. of Education v. Board of Trustees, 225 Ky. 21-24.
   Little Mutual Life Ins. Co., 150 Ky. 35.

5. History of this litigation 477

6. The constitutional question was pleaded in the original answer and was passed on in the first opinion 483

7. In 274 U. S. 76, the Supreme Court held that an additional franchise assessment of $1,730,090.00 for 1918, and $3,028,582.00 for 1919, was unconstitutional. The judgment which the opinion of March 27, 1931, affirms is for these exact amounts, to-wit, $1,730,090.00 for 1918, and $3,028,592.00 for 1919 491

8. The method, basis of calculation and every figure used in making the calculation that was reversed by the Supreme Court is the same in the present judgment which the opinion of March 27, 1931, affirms 491

[fol. 472]

9. The "claim for taxes with respect to the C. N. O. & T. P." is not new in the present record. It was in the prior record that was affirmed by this court and reversed by the Supreme Court 492

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10. Appellee in its petition for rehearing in the Supreme Court correctly contended that the claim for taxes with respect to the C. N. O. & T. P. was in the record in that court. It is, therefore, not new in the present record . . . 495

11. The judgment affirmed by the opinion of March 27, 1931, imposes a tax on property located outside of Kentucky contrary to the Fourteenth Amendment to the Federal Constitution 504

12. The "system" idea of taxation cannot be so extended as to bring into a State property or values outside of the State 506

    Fargo v. Hart, 193 U. S. 490.
    Illinois Central R. R. Co. v. Greene, 244 U. S. 555.
    Wallace v. Hines, 253 U. S. 66.
    Union Tank Line v. Wright, 249 U. S. 275.

13. The opinion erroneously affirms a judgment against the railroad corporation. The property was being operated by the Director General and, under the Federal Statutes, the Director General and not the corporation is responsible 511

    Davis, Director General v. Dantzler Lbr. Co., 261 U. S. 280.
    North Carolina R. Co. v. Lee's Adm'x, 260 U. S. 16.

[fol. 473]

    L. & N. v. Johnson's Adm'x, 207 Ky. 813, 270 S. W. 58.
    Blackburn v. L. & N., 202 Ky. 293, 259 S. W. 359.
    L. & N. v. Nelson, 199 Ky. 615, 251 S. W. 672.
    Doss v. I. C., 198 Ky. 222, 249 S. W. 346.
    L. & N. v. Banks, 195 Ky. 804, 243 S. W. 1018.

14. The opinion erroneously affirms a penalty against the Director General. No penalty can be assessed against the Director General. 512

Missouri Pacific R. Co. v. Ault, 256 U. S. 554.
Norfolk-Southern R. R. Co. v. Owens, 256 U. S. 565.

[fol. 474] IN COURT OF APPEALS OF KENTUCKY

SOUTHERN RAILWAY COMPANY and DIRECTOR GENERAL OF RAILROADS, Appellants,

vs.

COMMONWEALTH OF KENTUCKY on Relation, &c., Appellee

Appeal from the Woodford Circuit Court

PETITION FOR REHEARING—Filed May 15, 1931

We most earnestly call the court's attention in this petition for rehearing to the following points, none of which has been recognized by this court in its last opinion, and each of which will be presently demonstrated:

(1) This court has affirmed exactly the same judgment which was reversed by the Supreme Court of the United States in 274 U. S. 76, and without any change in the facts or the questions presented for consideration.

(2) This court based its opinion largely upon the idea that the defendant had not, in the trial court or on previ- [fol. 475] ous appeals to this court, presented the point that the assessment of franchise tax complained of by the appellants resulted in bringing into Kentucky for the purpose of taxation property and values appertaining thereto not in Kentucky and earnings derived from property not in Kentucky in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, when, as a matter of fact, the appellants

(a) pleaded this defense in their answer;

(b) this very question was expressly passed on adversely to the appellants by this court in its first opinion reported in 193 Ky. 474, 488, and which question could not thereafter be raised in the Kentucky courts under the law of the case rule. Hopkins v. Adams-Roth Grocery Co., 105 Ky. 357, 358;

(c) the Supreme Court of the United States in its opinion, 274 U. S. 76, expressly stated on page 85 that this point had been pleaded by the defendants and had been expressly passed upon by the Court of Appeals of Kentucky adversely to the defendants, the appellants.

(3) The Supreme Court of the United States did not say or intimate that it reversed this case because there was no pleading by the Commonwealth as to the C. N. O. & T. P. Ry. Co., and when the Supreme Court said there was no claim for taxes as to the C. N. O. & T. P. it did not mean that the facts with regard to the C. N. O. & T. P. were not [fol. 476] properly before the court or that there was any failure of pleading in that respect, as assumed by this court in its last opinion, but simply that there was no valid contention as to the C. N. O. & T. P., because that company had paid more taxes than would be represented by the average per mile system net earnings. On this point the Supreme Court of the United States (274 U. S. 81) said:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto."

(4) In this special statutory proceeding no testimony was introduced, orally or by deposition, the case being submitted on the pleadings and stipulated facts, and the rule well settled by the decisions of this court and the Federal courts, as shown in our reply brief, is that a stipulation, so far as it goes, takes the place of both pleadings and proof for the purpose of presenting any proposition therein contained for the court's consideration. Saltonstall v. Russell, 152 U. S. 628-630; In Re Blake, 150 Fed. 279 (8 C. C. A.);

Lincoln County Bd. of Education v. Bd. of Trustees, 225 [fol. 477] Ky. 21-24; Little Mutual Life Ins. Co., 150 Ky. 35.

(5) The usual method in Kentucky of assessing the franchise of a railroad which has a line both in and out of the State, namely, according to the average value per mile of the system, has been held by the Supreme Court of the United States in this case to be unconstitutional as applied to the Kentucky property of the appellants.

History

In 1920, the Commonwealth filed suit in the Woodford County Court to recover a franchise tax from the appellant, Southern Railway Company, a Virginia corporation, for the years 1914, 1915 and 1916. A separate suit was filed at the same time to recover a franchise tax for the years 1917 and 1918 against the Virginia corporation and the Director General of Railroads, because during these years all railroads had been taken over by the Government.

The defendant, Virginia corporation, owned a line of railroad of approximately nine thousand miles in length, extending from Washington, D. C., through most of the southern states. It also owned a line from New Albany, Indiana, to East St. Louis, Missouri.

The franchise tax which the State sought to collect is provided for in Sections 4077, et seq., Kentucky Statutes. [fol. 478] Both this court and the Supreme Court held that this franchise tax is a property tax, i. e., a tax on the intangible property of the corporation.

Commonwealth v. Southern Railway Co., 193 Ky. 474, 237 S. W. 11.

Greene v. Louisville & Interurban R. R. Co., 224 U. S. 499, 510.

Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 639, 641.

In the case of a railroad whose lines extend both within and without the State of Kentucky, the franchise tax has always been arrived at on the "system" basis. That is, the net income of the carrier and of all owned, operated, leased and controlled roads, is first capitalized. After deducting outside excess tangible values, there is allocated to Kentucky the proportion that the mileage of all owned, operated, leased and controlled roads within the State bear to the total of all owned, operated, leased and controlled roads, both within and without the State. From the amount thus allocated to Kentucky, there is then deducted the value of the tangible property of the carrier in Kentucky, and the balance is held to be the value of the intangible property for franchise tax purposes.

Wherever the carrier owns a majority of the stock of another road, both this court and the Supreme Court have held that such stock ownership constitutes the second road as a "controlled" road within the meaning of the Statute, [fol. 479] and that the income and mileage of such "controlled" road must be used in the calculation.

L. & N. v. Green, 244 U. S. 522, 549:

"(10) Plaintiff's next point is that the Board took into consideration a mileage proportion of 35.15 per cent, which was the ratio borne by the roads operated by plaintiff within the State of Kentucky to its total operated mileage; whereas it should have included the controlled mileage within and without the State, which would have yielded to Kentucky a proportion of only 24.69 per cent. In this the District Court yielded to plaintiff's contention, and, we think, rightly so. * * * In Commonwealth v. L. & N. R. R. Co., 149 Ky. 829, 838, the very point was considered by the Court of Appeals, which declared: 'If the railroad company owns a majority of the stock of any company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the Auditor. If required to be reported, the Board of Valuation and Assessment may take them into consideration in fixing the value of the franchise of the controlling company in the State of Kentucky.' "

The Virginia corporation did not operate in Kentucky. The Commonwealth sought to collect a franchise tax from it on the theory that it owned a majority of the stock of four railroad companies that did operate in Kentucky, to-wit, the Southern Railway Company in Kentucky, The Cumberland Railroad Company, The Cumberland Railway Company, and the Mobile and Ohio Railroad Company.

[fol. 480] The Southern Railway Company in Kentucky was a separate Kentucky corporation. It owned and operated a line of railroad in Kentucky, one hundred and twenty-seven miles in length (not counting trackage rights) extending from Louisville to Georgetown, Lexington, Burgin and Danville, Kentucky.

Annexed to each petition of the Commonwealth were "searching interrogatories" which "were unreservedly answered by the defendant." 193 Ky. 474.

In answering the interrogatories in each case, it was shown that beginning with January 1, 1917, the Virginia corporation indirectly controlled the Cincinnati, New Orleans and Texas Pacific Railway Company through indirect stock control. Thus it was shown that the Southwestern Construction Company owned a majority of the voting stock of the C. N. O. & T. P.; that the Virginia corporation owned a majority of the stock of the Alabama Great Southern Railroad Company; that as of January 1, 1917, the stock of the Southwestern Construction Company owned by the Alabama Great Southern Railroad Company plus the stock of the Southwestern Construction Company owned by the Virginia corporation constituted a majority of the voting stock of the Southwestern Construction Company.

In order that there may be no doubt on this subject the Seventeenth Interrogatory attached to the original petition [fol. 481] for 1914, 1915 and 1916 (R. 1st Appeal, p. 28), and for 1917 and 1918 (R. 1st Appeal, p. 20), was as follows:

"What interest, if any, did the defendant Southern Railway Company, or any one or more of its subsidiaries have in the capital stock, management, directorate or control of the Cincinnati, New Orleans and Texas Pacific Railway Company? Did defendant or any one or more of its subsidiaries operate, own, lease or control same?"

The answer to this interrogatory was in the record on the First Appeal (p. 62) for the years 1914, 1915 and 1916, and (p. 54) for the years 1917 and 1918, as follows:

"Prior to and since the 1st of January, 1917, a corporation called the Southwest Construction Company owned a majority of the voting stock of the Cincinnati, New Orleans and Texas Pacific Railway Company. The Southern Railway Company owned a certain number of shares of the stock of the Southwest Construction Company, and the Alabama Great Southern Railroad Company owned a certain number of shares of stock of the said Southwestern Construction Company. The Southern Railway Company owned a majority of the stock in the Alabama Great Southern Railroad Company. The ownership of the Southern Railway Company and the Alabama Great Southern Railroad Company in the stock of the Southwestern Construction Company was less than half of said stock. Since January 1, 1917, the amount of stock in the Southwestern Construction Company owned by the Southern Railway Com- [fol. 482] pany and the Alabama Great Southern Railroad Company has been more than half of said stock."

The answer to other interrogatories showed among other things the following:

1. That each of the four roads in Kentucky mentioned in the petition had already paid full tangible and franchise taxes on their respective property and earnings.

2. That the Southern Railway Company in Kentucky had never been a profitable line. That the result of its operations for the five years involved were as follows:

1914—Net Loss	$199,032.45
1915—Net Loss	181,624.96
1916—Net Loss	12,459.48
1917—Net Income	112,075.66
1918—Net Loss	605,191.04

Therefore, it appeared that there were no earnings for this line to be capitalized.

3. That the Virginia corporation leased thirteen separate railroads in 1917 (R. 1st Appeal, p. 48), and fourteen separate railroads in 1918 (R. 1st Appeal, p. 50).

4. That the Virginia corporation controlled by direct ownership of stock nineteen separate railroads in 1917 (R. 1st Appeal, p. 48), and twenty-two separate railroads in 1918 (R. 1st Appeal, p. 51).

The answers to the interrogatories further gave the mileage and net income of the Virginia corporation and of each [fol. 483] road that it directly owned, operated, leased or controlled.

The answers in each case denied the material allegations of the petitions, but admitted that the defendant, Virginia corporation, owned a majority of the capital stock of the Mobile and Ohio Railroad Company, and all but Directors' qualifying shares of the Southern Railway Company in Kentucky, The Cumberland Railroad Company and The Cumberland Railway Company.

Knowing that the above "system" basis was used in calculating franchise taxes, and knowing further that each of the roads referred to in Kentucky had already paid full franchise taxes on their separate property and earnings, and further that the Southern Railway Company in Kentucky had a net deficit in four out of the five years involved, each answer raised the constitutional question that the attempt was to tax property and earnings from property located outside of the State of Kentucky contrary to the Federal Constitution.

"Defendants say that the effort made here is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of the Constitution of the State of Kentucky, and of the Constitution of the United States, particularly the Fourteenth Amendment thereof." (R. 1st Appeal, 1st Case, p. 44; 2d Case, p. 37.)

[fol. 484] The case was submitted on the pleadings, exhibits and stipulations. The County Court and the Woodford Circuit Court each dismissed both petitions.

On Appeal this court held (193 Ky. 474):

1. That on account of the peculiar facts shown to exist, the defendant, Virginia corporation, for the purpose of franchise tax assessments, was the Southern Railway Company in Kentucky, and that the tax should be assessed as though the mileage of the Southern Railway Company in Kentucky was but a division of the Virginia corporation.

2. That the imposition of a franchise tax against the Virginia corporation based on the assumption that it was the Southern Railway Company in Kentucky would not be in contravention of the Federal Constitution.

"But it is insisted that this would result in taxing in Kentucky property having no situs here. A sufficient answer to this is that under the conclusions we have reached, the result is the same as if the Kentucky division had been operated in the name of the defendant, the same as is the operation of the Illinois Central Railroad and other foreign common carriers who pay a similar tax under the same statute." (193 Ky. 474, 488.)

In other words, in its first opinion, this court completely annulled for purposes of a franchise tax the separate ex- [fol. 485] istence of the Southern Railway Company in Kentucky, held that the mileage of the Kentucky corporation was but a division of the Virginia corporation, and remanded the case to the Circuit Court:

"* * * with directions that it proceed to ascertain the amount of intangible property which should be assessed for each of the years involved in Kentucky according to the prevailing rule of law upon the subject." (193 Ky. 474, 489.)

The constitutional question having been pleaded and decided against the defendant by the first opinion of this court, nothing remained except to figure the value of intangible property on the basis of the Virginia corporation's owning and operating the mileage of the Southern Railway Company in Kentucky.

When the cases were remanded to the Circuit Court, the defendant in the first case pleaded something that had not appeared in the first record, i. e., that for the year- 1914, 1915 and 1916, the "system" basis of calculation could not be used because for those years the Southern Railway Company in Kentucky, which this court held was the Virginia corporation, had no physical connection with the balance of the system.

In the suit for 1917 and 1918, the defendant filed an amended pleading emphasizing what had appeared in the [fol. 486] first record, i. e., the indirect control through indirect stock ownership of the C., N. O. & T. P. The mileage and income figures for the C., N. O. & T. P. were also given because these figures had not appeared in the first record. All other figures of mileage, earnings, etc., as to the Virginia corporation, and each owned, operated, leased and controlled line, were already in the record in answer to the original interrogatories.

The "prevailing rule of law upon the subject" and the method universally followed in Kentucky in the ascertainment of the franchise tax of a railroad with lines extending both within and without the State was, as stated supra and as is stipulated on the present appeal (pp. 55, 57), to capitalize the net railway operating income of all lines owned, operated, leased and controlled, deduct outside tangible values, assign to Kentucky the proportion that the number of miles of the carrier and of the lines owned, operated, leased and controlled by it in Kentucky bore to the total number of miles of the carrier and of the lines owned, operated, leased and controlled by it in Kentucky and elsewhere, and deduct tangible values in Kentucky. The balance was considered the value of the intangible property or the franchise value.

Parenthetically, we call attention here to the fact that the Supreme Court has held in the present case that the "prevailing rule of law upon the subject" of franchise assessments in Kentucky was unconstitutional as applied to the [fol. 487] peculiar facts of this case. 274 U. S. 76.

Following the instructions of the Court of Appeals that the franchise tax should be assessed "for each of the years involved in Kentucky according to the prevailing rule of law upon the subject" the Circuit Court capitalized the net income of the Virginia corporation and of each line owned, operated, leased and controlled by it, including the C. N. O. & T. P. for 1917 and 1918, deducted outside excess tangible values, allocated to Kentucky the proportion that the mileage owned, operated, leased and controlled in the State bore to the total mileage of all owned, operated, leased and controlled roads within and without the State, deducted values heretofore paid on tangible and intangible property by the Southern Railway Company in Kentucky, the C. N. O. & T. P., the Mobile & Ohio, the Cumberland Railroad and the Cumberland Railway, and adjudged that the balance was the omitted franchise value in Kentucky of the Virginia corporation.

On this basis, the judgment fixed an additional value of more than $900,000.00 for 1914, more than $2,000,000.00 for 1916, $1,730,090.00 for 1917, and $3,028,592.00 for 1918.

It is stipulated in the present record that the method of calculating the assessment by the lower court at that time for the years 1917 and 1918 was as follows:

[fol. 488] Year Ended June 30, 1917, on Which Taxes for the Year 1918 Were Based

Net railway operating income, Southern Ry. Co. Va., and owned, operated, leased and controlled roads		$31,806,408.49
Net railway operating income, C. N. O. & T. P.		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
Deduct:		
Total outside excess tangible values, i. e., shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
Total outside excess tangible values, i. e., shops, terminals and double tracks, C. N. O. & T. P.	1,019,582.15	
		68,851,913.86
Deduct total tangible outside values, we have		$456,530,007.57
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,761.36	
Entire mileage C. N. O. & T. P.	337.27	
	10,098.63	
Ky. mileage, Southern Ry. Co., Ky., M. & O. Cumberland R. R. and Cumberland Ry.	227.14	

Ky. mileage C. N. O. & T. P.	197.50	
	424.64	
Proportion Ky. to total mileage 4.209%—4.209% of $456,530,007.57, gives total value in Ky.		19,215,348.02
Equalized at 75%		14,411,511.02
Values heretofore paid on tangible and intangible property in Ky., by Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,053.00	
Values heretofore paid on tangible and intangible property in Ky. by C. N. O. & T. P.	9,181,368.00	
		12,681,421.00
Omitted value Southern Ry. Co., Va. franchise in Ky.		$1,730,090.02

[fol. 489] Year Ended December 31, 1918, on Which Taxes for the Year 1919 Were Based

Net railway operating income Sou. Ry. Co., Va., and owned, operated, leased and controlled roads		$32,969,380.58
Net railway operating income, C. N. O. & T. P.		3,047,946.55
		$36,017,327.13
Capitalized at 7%		$514,533,244.71
Deduct:		
Total outside excess tangible values, i. e. shops, terminals and double tracks of Sou. Ry. Co., Va., and owned, operated, leased and controlled roads	$80,160,065.06	

Total outside excess tangible values, i. e., shops, terminals and double tracks of C. N. O. & T. P.	2,046,735.53	
		82,206,800.59
Deduct total tangible outside values, we have		432,326,444.12
Entire mileage Southern Ry. Co. Va., and owned, operated, leased and controlled roads	9,601.83	
Entire mileage C. N. O. & T. P.	337.27	
	9,939.10	
Ky. mileage Sou. Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.11	
Ky. mileage, C. N. O. & T. P.	197.50	
	424.61	
Proportion Ky. to total mileage 4.273%—4.273% of $432,326,444.12 gives total value in Ky.		$18,473,308.96
Equalized at 85%		$15,702,312.62
Values heretofore paid on tangible and intangible property in Ky. by Sou. Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky. by C. N. O. & T. P.	9,173,208.00	
		12,673,720.00
Omitted value Southern Ry. Co., Va. franchise in Ky.		$3,028,592.62

On appeal this court held that the judgment in the first case for the years 1914, 1915 and 1916, should be reversed because of the fact pleaded in the amended answer, i. e., [fol. 490] that for those years the "system" basis of calculation would not be used because there was a gap between the balance of the system and the lines of the Southern Railway Company in Kentucky, i. e., the road which this court had previously held was the Virginia corporation.

This gap was closed for 1917 and 1918, because during those years the Virginia corporation indirectly controlled the C., N. O. & T. P. through the indirect stock ownership referred to above.

The constitutional question for those two years had already been foreclosed by the first opinion and was not open to argument in this court on the second appeal.

Hopkins v. Adams-Roth Grocery Co., 105 Ky. 357, 358:

"But the law as first determined—right or wrong—is the law of the case, and must control, not only the lower court upon a return of the case, but also this court in any subsequent appeal. Opinion of Appellate Court on first appeal cannot be revised in the same cause upon a second appeal."

This court on the second appeal affirmed the judgment for the years 1917 and 1918, because the assessment and judgment for those years were in accordance with and were concluded by the first opinion. This fact is stated in the present opinion of March 27, 1931, as follows:

"This court affirmed the judgment insofar as it made assessments for the years 1917 and 1918, without argu- [fol. 491] ment, or elaboration, because, as was stated, it was admitted that the assessments for these years were made in accordance with, and were concluded by, the former opinion * * *" (p. 15).

The second opinion is reported in 204 Ky. 388, 264 S. W. 850.

The case was then appealed to the Supreme Court. The opinion of that court is reported in 274 U. S. 76.

The Supreme Court held that the imposition of the additional franchise assessment of $1,730,090.00 for 1918, and $3,028,592.00 for 1919, was unconstitutional and reversed the judgment of this court.

The case was then remanded to the Circuit Court. That court rendered a judgment which is identical in amount, in method of calculation and in every other detail with the judgment that was reversed by the Supreme Court.

Thus it is stipulated in the present record (pp. 53, 56) the exact basis of calculation that was used in arriving at the judgment that was affirmed by this court in 204 Ky. 388, and that was reversed by the Supreme Court in 274 U. S. 76. The calculation on which the present judgment is based is shown in the record (pp. 62, 65). The slightest comparison will show that the method of calculation and the judgment on the present appeal are verbatim with the method of calculation and judgment that [fol. 492] was affirmed by this court on the second appeal and reversed by the Supreme Court.

It is submitted that the present opinion is erroneous because:

I

On the same facts the present opinion affirms the same judgment that has been reversed by the Supreme Court of the United States because such judgment imposed a tax on property outside of the State of Kentucky. Southern Railway Co. v. Kentucky, 274 U. S. 76.

There is not and can not be any dissent in the present opinion of the fact that the judgment which it affirms is identical in figures and in method of calculation and in every other respect with the judgment that was reversed by the Supreme Court.

With this fact admitted, it is necessary to see what is claimed to be different in the present record from the record that has heretofore been to the Supreme Court. The only new thing which the present opinion claims is now in the record is the filing of an amended petition:

> "* * * making claim for taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company."

[fol. 493] Thus the present opinion states:

> "It is the contention of counsel for the Southern Railway Company that the opinion of the Supreme Court was based upon exactly the same facts that now appear of record. In view of what has been said in this opinion we cannot agree with that contention. In the amended petition which was filed making claim for taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company a new question was presented."

This is the only new fact which the opinion claims is in the present record.

We respectfully submit that the "claim for taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company" is not a new fact or a new claim in the present record, but that on the contrary the claim for taxes in respect of the lines of the C. N. O. & T. P. was in the previous record and that there is nothing new about this claim whatever.

As soon as this court decided that the mileage of the Southern Railway Company in Kentucky was, for franchise tax purposes, the defendant Virginia corporation, and as soon as it appeared on the very first record in answer to the interrogatories that for the years 1917 and 1918 the defendant corporation indirectly controlled through indirect stock ownership the C. N. O. & T. P., there was necessarily included in the franchise tax assessment a "claim for taxes in respect of the lines of the Cincinnati, [fol. 494] New Orleans and Texas Pacific Railway Company," and of every other line which the defendant corporation owned, operated, leased or controlled during either of the two years in question.

When this court held that the mileage of the Southern Railway Company in Kentucky was to be considered as the mileage of the defendant, Virginia corporation, there was immediately brought into the case without further pleadings the income and mileage of every line which the Virginia corporation owned, operated, leased or controlled regardless of whether such lines were in the State or outside of the State.

It has been shown that the Virginia corporation for 1917 and 1918 leased thirteen and fourteen separate roads respectively, and that it controlled through stock ownership nineteen and twenty-two roads respectively. No pleading is necessary for any of these roads. No pleading by the Commonwealth has yet been made naming any of the leased roads or any of the controlled roads except four in Kentucky. No pleading for any of the owned, operated, leased or controlled lines is necessary. The mileage and income of such roads are necessarily included under the universal method in Kentucky of calculating the franchise taxes of interstate carriers.

That the opinion of March 27, 1931, is incorrect in stating that the claim for taxes in respect of the lines of the C. N. O. & T. P. is a new question can be shown by the [fol. 495] petition for rehearing filed in the Supreme Court by the plaintiff itself. Thus the petition for rehearing filed by plaintiff says:

> "This court in its opinion says 'there was no claim for any taxes in respect to the lines of the Cincinnati, New Orleans & Texas Pacific.' We submit that in this, this court has mistaken the record. Kentucky did claim taxes growing out of the C. N. O. & T. P. operation and ownership by the Southern system. * * *
>
> * * * * * * *
>
> "We submit that the statement in the opinion of this court that there was no claim for any taxes in respect to this line is a serious misstatement of the facts contained in the record. * * *"

When the plaintiff itself thus correctly states that a claim for taxes was made in the record that went to the Supreme Court, it is hard to see how the plaintiff will be permitted to now say that "a claim for taxes by reason of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company" (Amended Answer, Present Record, p. 60) is a new claim in the record.

It is submitted that the following statement in the present opinion (p. 31):

> "* * * When the case was remanded to the Circuit Court the Commonwealth, perceiving that it had made no claim for taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company, filed an amended petition, * * *"

is at complete variance with the statements by the Commonwealth in its petition for rehearing quoted above that [fol. 496] it had theretofore made claim for taxes in respect of the lines of the C. N. O. & T. P.

As further showing that the claim for taxes and all necessary facts and figures with reference to the C. N. O. & T. P. and each of the other owned, operated leased and controlled lines were already in the record, the plaintiff says further in its petition for rehearing in the Supreme Court:

> "* * * The facts essential to make out this state of affairs were positively pleaded in an amended answer filed May 20, 1922, Record 139, in which the stock control and physical operating control was set up fully. This pleading was responded to in amended reply filed the same day, Record 141, in which the commonwealth said, 'Plaintiff admits that said C. N. O. & T. P. Railway Company was a part of the general system of defendant for said two years and was operating as alleged.' The additional stipulations filed as of the same date, Record 143, gave all the essential facts regarding unification of the system with the C. N. O. & T. P., its mileage by counties, its excess values and assessed taxes, and concludes, Record 141, 'The defendant has owned and controlled the said C. N. O. & T. P. to the extent and as above set out in its amended answer.'
>
> "These pleadings and this stipulation of facts have always been treated by all parties to this controversy as entirely sufficient to raise the question whether the facts as stated were sufficient to warrant a basis of unit taxation of the entire system, including the C. N. O. & T. P. for the two years mentioned. The question was never raised as to the sufficiency of these pleadings and stipulations. They [fol. 497] were always treated as bringing the question fairly and squarely before the court by counsel for both sides and there never has been any exception or question made of the fact that the State of Kentucky was laying a claim for taxes in respect to the C. N. O. & T. P. Railway.
>
> "We submit that the statement in the opinion of this court that there was no claim for any taxes in respect of this line is a serious misstatement of the facts contained in the record. Taxes have always been claimed since these pleadings went into the record and it has always

been admitted that if the pleadings and stipulations were sufficient to make out a case then the case was established they were put in for the purpose of testing whether the case really existed."

Furthermore, the opinion of this court of March 27, 1931, shows that the claim for taxes in respect of the lines of the C. N. O. & T. P. is not a new fact in the record.

It will be remembered that the second opinion of this court, 204 Ky. 388, affirmed a judgment assessing a franchise tax against the defendant in the identical amounts as are in the present judgment, and further that the stipulation shows that the method of calculation was identical with the method of calculation used in the present judgment and that both calculations included figures of the C. N. O. & T. P. and of every other owned, operated, leased and controlled line.

The present opinion states that these judgments were [fol. 498] correct and were correctly calculated.

> "That these assessments were correct was shown by the stipulation on which they were based. * * * The usual method allowed by the Statutes and approved by this court and the Supreme Court was followed in seeking these assessments. * * *
>
> "This court affirmed the judgment in so far as it made assessments for the years 1917 and 1918 without argument, or elaboration, because, as was stated, it was admitted that the assessments for these years were made in accordance with, and were concluded by, the former opinion. This statement in the opinion shows that it was recognized that the circuit court had properly assessed the property for taxation for these years on the facts admitted in the stipulation considered as evidence in the case * * * (p. 15).
>
> "When this court affirmed the assessment made against the Southern Railway Company for the years 1917 and 1918, loosely speaking, it did so because of the fact that it was admitted that the assessment had been made in accordance with the principles announced in the former opinion. * * * The point, however, was not pressed as it was admitted that the assessment had been made as directed by the court in its former opinion, which was, in

effect, an admission that the assessment for the years 1917 and 1918 had been made in accordance with the provisions of the Statutes as construed by the courts." (p. 20.)

It is submitted that the above statements by this court in the present opinion are correct, that is, the calculation and assessments were made in accordance with the former opinion, and in accordance with the Statutes and opinions of this court and of the Supreme Court.

[fol. 499] Since this is true, then it obviously follows that everything necessary to make the assessments was already in the record and no other or further pleading was necessary by the Commonwealth in order to make the assessments.

If the former assessment, which is identical with the present assessment, was correct, as is stated by the court in the present opinion, then it obviously follows that every claim necessary in respect to the C. N. O. & T. P. was already in the record. It also follows that the statement of the Commonwealth in its petition for rehearing in the Supreme Court that claim for taxes had already been made in respect of the lines of the C. N. O. & T. P. is correct. Therefore, the claim in respect to the C. N. O. & T. P. is not new in the present record.

Since the two assessments and judgments are identical then either the former judgment of this court which affirmed the first assessment was erroneous, or else the claim with respect to the C. N. O. & T. P. is not new in the record. The court in its present opinion says, as quoted supra, that the former assessments were made in accordance with and were concluded by the first opinion. Therefore, every necessary fact to sustain the former assessments must have been and was in the pleadings and record, including the claim with respect to the C. N. O. & T. P.

[fol. 500] It is submitted that the present opinion of this court has entirely misconstrued the opinion of the Supreme Court.

From the record that went to the Supreme Court, it affirmatively appeared that for the year 1917, the Southern Railway Company in Kentucky had a net income of only $112,075.66, and that for the year 1918, it had a net deficit of $605,191.04; that considered as a separate entity, it had already paid all tangible and intangible property taxes to the State.

The Supreme Court correctly held that the imposition of an additional intangible value of more than one million dollars for 1917 and more than three million dollars for 1918, on the "system" basis of calculation was unconstitutional.

In the record that went to the Supreme Court, it affirmatively appeared that the average system earnings of the defendant, i. e., of all owned, operated, leased and controlled lines, including the C. N. O. & T. P., were $3,641.75 per mile for 1917, and $3,623.81 per mile for 1918, whereas the earnings of the C. N. O. & T. P. considered alone were $14,736.93 per mile for 1917, and $9,037.11 per mile for 1918.

In other words, it affirmatively appeared that the C. N. O. & T. P. considered alone had net earnings per mile of three to four times that of the system, including the C. N. O. & T. P., and since it had reported and paid taxes on its own income no additional taxes could be claimed against the C. N. O. & T. P. as a separate entity, and no additional taxes [fol. 501] could be claimed against it as a part of the system because it had already paid taxes to Kentucky on earnings which were far in excess of the system average.

That was all the Supreme Court said or meant to say when it used the phrase quoted in the present opinion, as follows:

"There was no claim for any taxes with respect of the lines of the Cincinnati, New Orleans and Texas Pacific."

This is plain from the two sentences of the Supreme Court which immediately follow the above sentence, but which are not quoted in the opinion of this court, to-wit:

"* * * that company (the C. N. O. & T. P.) had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky, and that the taxes so paid were based on values per mile in excess of the average value per mile for the system arrived at by capitalization of net railway income in accordance with the method applied by the State."

Furthermore, every fact with reference to the C. N. O. & T. P. pleaded in the amended answer was, as stated by the Commonwealth in its petition for rehearing in the Supreme Court, covered by stipulations in the record that went to the Supreme Court.

Both this court and the Supreme Court have held that where facts are stipulated, the sufficiency of the pleading is waived. A stipulation has the effect of dispensing with [fol. 502] both pleadings and proof on the subject covered thereby.

Saltonstal v. Russell, 152 U. S. 628-630:

"This case having been submitted to the Circuit Court upon a statement of facts agreed by the parties, or case stated, upon which the Court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial; and no finding of facts by the court was necessary. Williard v. Wood, 135 U. S. 309, 314, Bond v. Dustin, 112 U. S. 604, 607."

Lincoln County Bd. of Education v. Bd. of Trustees, 225 Ky. 21-24, 7 S. W. (2d) 499:

"In addition the point was decided adversely to the contention of appellant in the case of Lodge, et al., v. Williams, et al., 195 Ky. 773, 243 S. W. 1011. In that case it was held that the parties to a suit in a court of general jurisdiction may agree as to the subject matter of their litigation and waive the objection that the issue was not embraced by the pleadings."

Since all facts with reference to the C. N. O. & T. P. were, as stated by the Commonwealth in its petition for rehearing quoted supra, stipulated in the record on the second appeal and in the record that went to the Supreme Court, such stipulation under the law and practice of the Supreme Court and of this court dispensed entirely with both pleading and proof on that subject and enabled the plaintiff to recover on account of the C. N. O. & T. P. if it was entitled to recover on that account.

[fol. 503] Therefore, the reversal by the Supreme Court was not because of any technical omission in the Commonwealth's pleading to mention the C. N. O. & T. P., but the reversal was because on the merits of the case the Supreme Court found that the proposed assessment was unconstitutional.

The proposed franchise tax assessment is against the mileage of the Southern Railway Company in Kentucky, because this court on the first opinion held that such mileage was to be treated as a division of the Virginia corporation. Any value found against the Virginia corporation can only be assessed against its mileage and not against the mileage of an owned, operated, leased or controlled line. Therefore, the Supreme Court was correct in holding that none of the proposed additional assessment could be allocated to the C. N. O. & T. P. mileage.

From all of the above it is submitted that:

1. The amendment which purports to make claim for taxes in respect of the line of the C. N. O. & T. P. is neither new nor necessary.

2. Since all facts re the C. N. O. & T. P. were covered by prior stipulations the sufficiency of the pleading was waived.

3. The reversal by the Supreme Court was on account of the merits and not on account of any failure of the pleadings, because no such failure existed.

[fol. 504] 4. It was not necessary for the Commonwealth to mention in its pleadings any owned, operated, leased or controlled lines, because all such lines are by statute and by the rulings of this court and the Supreme Court necessarily included in a franchise assessment against an interstate carrier.

II

The judgment which is affirmed by the opinion of March 27, 1931, imposes a tax on property located outside of the State of Kentucky, contrary to the Fourteenth Amendment to the Constitution of the United States.

Independent of the opinion of the Supreme Court, it can be shown that the present judgment is unconstitutional in that it imposes a tax on property and on earnings derived from property outside of the State of Kentucky, contrary to the Fourteenth Amendment to the Constitution.

The franchise tax against the defendant is based on the holding in the first opinion of this court, 193 Ky. 474, that the line of the Southern Railway Company in Kentucky was a division of the Virginia corporation.

It is undeniably shown in the present record that the Southern Railway Company in Kentucky had earned only $112,075.66 in 1917, and had a net loss of $605,191.04 in 1918 (Exhibits 217a, 217c of the Supreme Court record, which is stipulated in the present record, p. 59, to be [fol. 505] correct). Notwithstanding this fact, the assessment which this court in its present opinion affirms has given an added franchise value of $1,730,090.00 for 1917, and $3,028,592.62 for 1918.

The following table with reference to the Southern Railway Company in Kentucky, whose alleged added intangible value the Commonwealth is proposing to assess shows that the business done and the earnings and operations of the Southern Railway Company in Kentucky had no relation whatever with the additional tax imposed:

	Original tangible and intangible assessment originally paid on	Southern Ry. Co. in Ky. net income	Proposed additional assessment
1914	$2,128,789.00	*$199,032.45	$972,662.00
1915	2,128,789.00	*181,624.96	None.
1916	2,128,789.00	*12,459.48	2,018,561.00
1917	2,137,072.00	112,075.66	1,730,090.00
1918	2,137,072.00	*605,191.04	3,028,592.00

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*Net Loss, red in copy.

The method of calculating franchise taxes of interstate carriers in Kentucky is on the "system" basis, i. e., to use income and mileage figures of the carrier and of all owned, operated, leased and controlled lines within the State and outside the State, to deduct outside excess tangible values and allocate to Kentucky the proportion of the mileage the owned, operated, leased and controlled roads in Kentucky bore to the total mileage of all owned, [fol. 506] operated, leased and controlled lines, both within and outside of the State.

Where the lines of a common carrier extend through various States, it has been recognized that in ascertaining the added or intangible value of the lines in a particular State, nothing else appearing, it is proper for the particular State to take its mileage proportion of the total. This "system" idea, nothing else appearing, has been applied in cases of railroad, telegraph and express lines.

C. C. C. & St. L. Ry. Co. vs. Backus, 154 U. S. 439, 446.

Western Union Tel. Co. v. Massachusetts, 125 U. S. 530.

Adams Express Co. v. Ohio, 165 U. S. 194.

However, the "system" idea cannot be so used or extended as to bring into a State property or values outside of the State.

Fargo v. Hart, 193 U. S. 490:

"It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside of the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every [fol. 507] mile. That would be taxing property outside of the State under a pretense."

Illinois Central R. R. Co. v. Greene, 244 U. S. 555:

In this case the Supreme Court restated the principle that organic unity of the system plan of taxation could not be made the means of unlawfully taxing property outside the State.

562. "The claim for an allowance by reason of the treasury securities and the terminals situate in other States is based upon the principle laid down in Fargo v. Hart, 193 U. S. 490, 499, and similar cases, to which we adhere, that a State cannot tax property outside of its jurisdiction belonging to persons domiciled elsewhere, and that although the fact that property is part of a system and has its actual

uses only in connection with other parts of the system may be considered by the State in taxing that portion of the system which is within its borders, yet the notion of organic unity must not be made the means of unlawfully taxing property without the State."

Wallace v. Hines, 253 U. S. 66:

69. "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore, no property of such an interstate road situated elsewhere can be taken [fol. 508] into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State."

Union Tank Line v. Wright, 249 U. S. 275:

282. "A State may not tax property belonging to a foreign corporation which has never came within its borders—to do so any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the State according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the State to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operated in many States often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western Union Telegraph Co. v. Massachusetts), and the average amount of property habitually brought in and carried out by a car company (American

Refrigerator Transit Co. v. Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Marye v. Baltimore & Ohio R. R. Co., 127 U. S. 117; [fol. 509] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26; Adams Express Co. v. Ohio, 165 U. S. 194; s. c. 166 U. S. 185; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149; Fargo v. Hart, 193 U. S. 490; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453."

It is shown in the present record that the one hundred and twenty-seven miles, not counting trackage rights of 38.05, of roads in Kentucky, which this court held was the Virginia corporation, had only earned $878.19 per mile for the first year, and had lost $4,742.13 per mile for the second year, whereas the judgment which this court now affirms gives an additional franchise or intangible value of $1,730,090.00, or more than $13,500.00 per mile, for the first year, and $3,028,592.00, or more than $23,700.00 per mile, for the second year.

The record further shows that the total railway operating income and mileage of the Virginia corporation and of all lines which it owned, operated, leased or controlled were as follows:

1917, on Which Taxes for 1918 Were Based

Net railway operating income	$36,776,734.50
Total miles operated	10,098.63
Net railway operating income	$3,641.75 per mile

1918, on Which Taxes for 1919 Are Based

Net Railway operating income	$36,017,327.13
Total miles operated	9,939.10
Net railway operating income	$3,623.81 per mile

[fol. 510] Under the facts, it is submitted that the "system" basis of calculation, which results in the above large additional intangible value assessment against the defendant corporation, is so arbitrarily excessive as to be unconstitutional. It shows on its face that there has been imported into Kentucky for taxation values outside of the State of Kentucky contrary to the Fourteenth Amendment of the Federal Constitution.

The unconstitutionality of this assessment was pleaded in the prior records. It is again pleaded in the new present record (pp. 40, 45, 46).

The opinion of March 27, 1931 (pp. 33, 34, 35) defends the constitutionality of the present assessment on the ground that it is similar to the franchise assessments of other interstate carriers.

Fortunately the Southern Railway Company in Kentucky was a separate corporation and kept its books separately. The exact income, therefore, for this road can be and has been shown in the record. Whether or not carriers, which did not have separate corporations in Kentucky, could show the exact earnings and income in Kentucky, we do not know.

It is clear, however, that regardless of what other corporations may or may not do, this defendant is entitled to be protected against an unconstitutional tax.

It is submitted that the present assessment brings into Kentucky for taxation values and earnings derived outside [fol. 511] of the State. It is therefore unconstitutional.

In addition to the above, the court's attention is called to the following:

1

It is pleaded in the record that during the years involved the railroads had been taken over and were being operated by the Government of the United States through the Director General of Railroads. Under these circumstances, the present opinion is in error in affirming a judgment against the railroad corporation.

The Director General of Railroads took possession in December, 1917. Congress subsequently passed an Act which was approved on March 21, 1918, providing for the Federal Administration of railroads. (U. S. Comp. Stats. Anno. Supp. 1919-1923, Sec. 3115¾, et seq., 40 Stat. at Large, 457.) This Act provided that all taxes assessed against the railroads during Federal control should be paid by the Government.

Both this court and the Supreme Court have frequently held that the Director General and not the corporation was responsible during Federal control and that the Federal control act was supreme even where it conflicted with the State law.

[fol. 512] Davis, Director General v. Dantzler Lbr. Co., 261 U. S. 280.
North Carolina R. Co. v. Lee's Adm'x, 260 U. S. 16.
L. & N. v. Johnson's Adm'x, 207 Ky. 813, 270 S. W. 58.
Blackburn v. L. & N., 202 Ky. 293, 259 S. W. 359.
L. & N. v. Nelson, 199 Ky. 615, 251 S. W. 672.
Doss v. I. C., 198 Ky. 222, 249 S. W. 346.
L. & N. v. Banks, 195 Ky. 804, 243 S. W. 1018.

2

The present opinion is erroneous in that it affirms a penalty of twenty per cent imposed against the Director General of Railroads. No penalty can be assessed against the Director General.

Missouri Pacific R. Co. v. Ault, 256 U. S. 554.
Norfolk-Southern R. R. Co. v. Owens, 256 U. S. 565.

That this twenty per cent is a penalty is stated in the present opinion (pp. 36, 37), and also in the case of Bank of Kentucky v. Commonwealth, 107 S. W. 812, 32 Ky. L. R. 1087. The present opinion in justifying the penalty, states:

37. "This property was not assessed because the Southern Railway Company failed to make the report required by the Statutes. Clearly it is a case where the penalty may be imposed."

In making the above statement this court had undoubtedly overlooked the fact that during these years the entire railroad property had been taken over and was being operated [fol. 513] by the Government. All reports and everything else in connection with the taxation of property was in the hands of the Government. The corporation had nothing whatever to do with the making or the failure to make any reports.

3

The opinion states (p. 5), also in referring to the first opinion:

"That it controlled the C. N. O. & T. P. Railway Company was a fact not developed up to the time that the matter was remanded to the Circuit Court of Woodford County."

As has been shown supra, the answer to the Seventeenth Interrogatory in the original appeal showed the indirect stock control of the C. N. O. & T. P., beginning with January, 1917.

4

On pp. 29 and 32 the court undoubtedly erroneously uses the words "Manchester Railroad Company and Manchester Railway Company" when it meant to say "Cumberland Railroad Company and Cumberland Railway Company," respectively.

5

The opinion states (p. 30):

"As there was no claim for taxes in respect of the lines of that company (C. N. O. & T. P.) it followed, as a matter [fol. 514] of course, that the mileage owned by that company should not have been used to increase the proportion of the lines owned, operated, leased or controlled in Kentucky to the total mileage of the system."

It is submitted that the Statutes and decisions of this court both hold that in assessing the lines of an interstate carrier, Kentucky's proportion of the capitalized value is that proportion of the mileage of all owned, operated, leased and controlled lines in the State to the total of all owned, operated, leased and controlled lines within and without the State, and that no claim need be made as to any specific owned, operated, leased or controlled line.

6

The opinion states (p. 34):

"Let us see what brought about the difficulty with the assessments made for the years 1917 and 1918. The Southern Railway Company controlled the Southern Railway Company in Kentucky, and the Cincinnati, New Orleans & Texas Pacific Railway Company, during these two years. It was the duty of the Southern Railway Company to make a report giving its total mileage for all roads owned, operated, leased or controlled and the net income from such roads. It failed to do that and allowed the two controlled roads mentioned to make separate reports. If the Southern Railway Company had made the reports as required by the Statutes * * *. This was brought about through the failure of the Southern Railway Company to comply with the law."

[fol. 515] We again remind the court that during these two years all of the railroad properties were in the hands of and being operated by the Government. It was not the duty of the corporation to file any reports whatever during either of these two years.

7

The opinion states (p. 35):

"Some of the larger systems of railways operating in Kentucky own, lease, operate or control mileage that does not yield a large income, but, after eliminating the excess values outside of Kentucky, this mileage has been considered of equal value mile for mile with the other mileage of the system. To allow the Southern Railway Company to escape these additional assessments is to allow it to escape the payment to the State and counties affected of taxes undoubtedly just if the assessments of railroad properties in Kentucky for the last thirteen years have been correctly made, * * *."

The fact that the mileage of other systems has been "considered of equal value mile for mile with the other mileage of the system" does not make it constitutional to tax as here mileage on an equal basis where it is affirmatively shown that such mileage is not of equal value mile for mile.

[fol. 516] On account of all of the above, we ask that the opinion of March 27, 1931, be withdrawn and that the judgment of the lower court be reversed with instructions to dismiss the petition.

Respectfully submitted.

Edward P. Humphrey, Charles W. Milner, Attorneys for Appellant, Southern Railway Company.
Humphrey, Crawford & Middleton, of Counsel.

[fol. 517] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—May 22, 1931

Came the appellee by counsel and filed response and notice to petition for rehearing.

[fol. 518] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

REPLY TO PETITION FOR REHEARING

There is nothing new in the petition for rehearing. Every point made in it was pressed in the brief for appellant and is answered fully in the able opinion of this court prepared by Judge Logan. The case simply comes to this: Shall appellant be taxed as all other taxpayers? Or shall it be adjudged without right an exemption from taxation? The taxes against all other railroads in the state have been assessed exactly as the taxes of appellant have been assessed by the judgment herein. All others have paid their taxes. If the judgment herein is not enforced, appellant will simply obtain an exemption from taxation to which it is not entitled.

The Supreme Court did not adjudge anything of that sort. The record that went to the Supreme Court was a copy of the record in this court, which is before you on this appeal. That record only showed in the judgment the [fol. 519] amount of taxes assessed. It did not show how this amount was reached or upon what basis it rested. The figures upon which the result was reached were not in the record. The petition upon which the recovery was had only set up the ownership of the line from Louisville to Danville and the case was argued before that court on the basis that the assessment was only rested on this little line and was confiscatory. That the court may clearly see this we call attention to and make part hereof a copy of appellants' brief in that court, filed herein on the hearing hereof, on which the opinion of that court rests.

That court, not having in the record the figures showing how the assessment was made and looking to the pleadings for the issues before the court, thought that the assessment was too large, but this conclusion was due to the condition of the record. The fact is there was a mistake in the record. Our amended petition, drawn before the second appeal to this court, was by some mistake never filed or made part of the record and we did not observe this when the case was in this court, as no question was then raised on the subject.

The Supreme Court did not mean to adjudge appellant an exemption from taxation or to adjudge that it might not be taxed just as all other railroad companies are taxed. It did not have enough before it to show that this had been done and it rested its conclusion entirely on what was then before it. A very different case is presented by the record as it now stands. That court will have no difficulty in affirming the judgment of this court when the facts are before it and it sees that appellant is taxed just as all other like corporations; for it has affirmed the judgments of this court in the following cases in which the facts as to [fol. 520] the calculation of the assessments in such cases are fully set out: Henderson Bridge Co. v. Kentucky, 166 U. S. 150; Adams Express Co. v. Kentucky, 166 U. S. 171; L. & N. R. Co. v. Greene, 244 U. S. 522; I. C. R. Co. v. Greene, 244 U. S. 555.

In Mutual Life Ins. Co. v. Hill, 193 U. S. 557, the Supreme Court rule as to the effect of former appeals is thus stated:

"While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion, yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

Again in Messenger v. Anderson, 225 U. S. 436, the rule is thus stated:

"In the absence of statute the phrase, 'law of the case', as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. King v. West Virginia, 216 U. S. 92, 100, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co., 198 [fol. 521] U. S. 95, 99, 100, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 343, 40 L. ed. 991, 993, 16 Sup. Ct. Rep. 850. Of course this court, at least, is free when the case comes here."

To the same effect see Wolf Packing Co. v. Industrial Relations, 267 U. S. 562.

The Supreme Court's opinion shows that it reversed the judgment for these reasons:

1. "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific" (p. 81).

This is the main line in the State and was the reason for the distinction this court made between the years 1917-18, and the three previous years. The judgment of the Supreme Court rests on its conclusion that the assessment before the court was an assessment on 127.65 miles of railroad in the state; the court said that this was an assessment of $13,555.00 per mile for 1917 and $23,730.00 per mile for 1918 and was excessive. The figures are obtained by dividing the amount of the assessment by 127.65. Not so here, the assessment is based on 424.64 miles of railroad in the state and is only about one-third as much per mile as the assessment the court there held excessive. To say that the judgment of the Supreme Court holding an assessment of 127 miles excessive is conclusive that a like assessment of 424 miles at the same amount is excessive is simply without reason, and this is the sum of the petition for rehearing.

The contention that the assessment is unwarranted and is a taxation of property not in this state is wholly without foundation in the record. The only substantial ground attempted to be made out is the showing that the line from [fol. 522] Louisville to Danville and its branches known as the Southern in Kentucky, lost money; but there was never a railroad system in which some of its branches did not lose money, and there is no attempt to show that the lines in Kentucky as a whole lose money or that they were not equal to the average of the system in profits. In fact the Cincinnati Southern and the Mobile and Ohio are two of the most profitable lines of the system. See U. S. Record p. 140, also p. 217 A-D. If anything was lost on the Southern in Kentucky it was more than made up on the other two lines. Therefore appellant made no attempt to show that the Kentucky lines as a whole fell down. The burden was on it to show this to make out any ground for relief on this ground; for the tax is based on all the Kentucky lines. Not only so, this line connects the system with Louisville, Indianapolis, St. Louis and the West. See maps on stockholders reports. It thus brings business to the system for long hauls and its value is *mo*t determined alone by the cash taken in on it.

Through passenger trains were run from St. Louis, Missouri to Danville, Kentucky, but no farther. (Stipulation 7 p. 138, U. S. Record.)

Back of all this the claim that this line lost money rests alone upon appellants' bookkeeping. As you will see from the stockholders reports U. S. Record p. 217, there was a charging in 1917 against this line for hire of freight cars, debit balance $431,246.00, also joint facility rents $153,697 and these two items alone about equal the alleged shortage. (See p. 217 a.)

Now how did this come about? The line was originally known as the Louisville Southern Railway. Being a short line it had only a rew engines or cars. It failed and was [fol. 523] bought by the Southern. Then to dodge Kentucky taxes it did not operate the line in its own name, but organized the Southern in Kentucky and these facts are stipulated (Supreme Court Record p. 34-7):

"When the Southern Railway Company in Kentucky acquired the property of the Louisville Southern Railway Company in 1894, it also acquired the following equipment, viz:

Steam locomotives	
Box cars	25
Flat cars	609
Stock cars	47
Caboose cars	70
All classes of freight cars	12
(Fol. 145) Coaches	738
	15

Combination passenger cars	3
Baggage and express cars	5
All classes of passenger cars	23
Derrick cars	1
Other Company Service cars	7
All classes of company service cars	8
All classes of cars in service	769

Since that time above named equipment has been used by the Southern Railway Company in Kentucky in common exchange with the defendant, Southern Railway Company of Virginia, that is, portions of the equipment above named have been used by the Southern Railway in Kentucky, and portions of the Southern Railway Company of Virginia outside of Kentucky, but where any of this equipment is used by the Southern Railway Company of Vir- [fol. 524] ginia, such use by the Southern Railway Company of Virginia was without charge to that company, in consideration of that company's furnishings to the Southern Railway Company in Kentucky a like number of engines or cars without charge to the Southern Railway in Kentucky.

When any of the above equipment has become out of repair or unfit for service, it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway in Kentucky; so that for every period of time from 1894 (Fol. 146) up to and including the present time, the Southern Railway in Kentucky owns the same number of locomotives, freight and passenger cars, etc. that it did in 1894 and has reported each year and tax paid each year on the same description and value of equipment as on hand September 17, 1894.

Southern Railway Company in Kentucky has bought no equipment since 1894. Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in stipulation 2, it is leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of other various railroad companies, and has done this under the usual traffic arrangement obtaining among railroads, and for such use of equipment has paid to the defendant, Southern Railway Company of Virginia, and other railroads, the regular charges for such hire or equipment."

Of course this line can not with the little equipment it had do the business of the Southern System with Louisville and the West. So the Southern furnishes the cars and engines at the rates usual between railroads. These rates [fol. 525] are fixed very high to bring equipment home. Otherwise much would be kept indefinitely. We all know this. It is a matter of common knowledge that no railroad company could live on any such basis. The joint facility rents are not paid for this line. They are paid for the system.

The defense is on a par with all the other conduct of appellant. It started out to dodge Kentucky taxation. For this reason it made this dummy corporation. (See U. S. Record, p. 41). For this reason it ran the Cincinnati line in the name of the Cincinnati, New Orleans and Texas Pacific until we uncovered the pretense in this suit. For this reason it maintained on the first appeal that the Mobile and Ohio did not connect with its system. For this reason it left a little gap in the City of Louisville which it claimed not to own so that its line to the West did not connect with the Southern in Kentucky. For this reason it framed its contract and kept its books with the Southern in Kentucky so as to make a showing of no profits but a loss, when the fact is there is not another short line in Kentucky doing as much business and appellant has not another short line so necessary to the system as this line.

There was never in all the history of this court a more cold-blooded persistent and groundless attempt to evade Kentucky taxation justly due. The defense has not a foot to rest upon the facts. The other matters relied on are all covered by our brief filed on the original hearing and we ask attention to it. This is a very important case for the state, for it involves not only the taxes for these two years, but for all future years, for the Supreme Court holds the judgment conclusive for all future years where the facts are the same. Not only so, it opens the door wide for all [fol. 526] the other railroads to do the same thing and thus destroy our statute.

That the parent corporation may be taxed on the property held for it by subsidiary corporations is well settled. Hart Steel Co. v. R. Supply Co., 244 U. S. 294; Southern Pacific Co. v. Lowe, 247 U. S. 330; Chicago &c. R. Co. v.

Minn. Assoc., 247 U. S. 490; Gulf Oil Co. v. Lewellyn, 248 U. S. 71; U. S. v. Phillis, 257 U. S. 156. This court has held the same thing in the case of the L. & N. R. Co. where lines are run in the name of a subsidiary corporation owned by it and seen Com. v. Southern R. Co., 193 Ky. 474.

We confidently submit that the opinion of this court is clearly right and will be promptly affirmed by the Supreme Court on appeal.

Appellant concealed the truth from the board and went before the state board and obtained an inadequate assessment of the line running from Cincinnati to the South. If the true facts had been disclosed to the board a very different assessment might have been made. That the assessment was wholly inadequate is shown by the facts which are not presented. When appellant is credited on the assessment now made by the amount of that assessment, it has received all that it can justly claim and no injustice will be done. This is necessarily the proper rule, for otherwise the state would have no remedy where the truth was fraudulently concealed and partial asessments made of subsidiary corporations when the thing really to be assessed was the parent corporation. Equity regards that as done which ought to be done and looks past the nominal parties to the real parties, to the substance and essence of things. Seymour v. Spring &c. Assoc., 144 N. Y. 333; Hitchman Coal Co. v. Mitchell, 245 U. S. 229.

Stress is placed in the petition for rehearing on the fact that the assessment now before the court is in the same [fol. 527] amount as the assessment before the Supreme Court. But as shown by that opinion the assessment was then held confiscatory on the ground that it was an assessment only of the 127 miles of road between Louisville and Danville. The assessment now before the court, while in the same amount, is an assessment of all the roads in Kentucky, or 426 miles of road. The assessment which the Supreme Court held confiscatory was more than three times as much per mile as the assessment now before the court and the opinion of that court must be limited to the question actually decided.

Respectfully, L. W. Morris, D. L. Hazelrigg, Hobson & Hobson, for Appellee.

Endorsed: Filed May 20, 1931. W. B. O'Connell, C. C. A.

[fol. 528] IN COURT OF APPEALS OF KENTUCKY

ORDER OVERRULING PETITION FOR REHEARING—June 5, 1931

The Court being sufficiently advised, it is considered that the appellants' petition for rehearing be and the same is overruled.

IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—June 19, 1931

Came parties by counsel and filed an agreement that both cases be taken to the Supreme Court of the United States on one record.

[fol. 529] IN COURT OF APPEALS OF KENTUCKY

ANDREW W. MELLON, Director General of Railroads of the United States, Appellant,

vs.

COMMONWEALTH OF KENTUCKY on Relation, etc., Appellee

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY on Relation, etc., Appellee

STIPULATION RE RECORD ON APPEAL

These two cases were heard together on one record in the trial court, namely, the Woodford Circuit Court of Kentucky, and in the Court of Appeals of Kentucky, which is the court of last resort of the State of Kentucky, which record was made up by the parties to the two cases for the purpose of both cases.

It is now agreed by the appellant in each case, to-wit, Andrew W. Mellon, Director General of Railroads of the United States, and Southern Railway Company, and also by the Commonwealth of Kentucky, that appellee in each case, that these cases may be taken to the Supreme Court of the United States on one record, and the said appel- [fols. 530 & 531] lants and the said appellee agree, so far as they have the power to agree, that the said two cases may be heard together in the Supreme Court of the United States.

Edward P. Humphrey, Charles W. Milner, Attorneys for Andrew W. Mellon, Director General of Railroads of the United States, and Southern Railway Company, Appellants. L. W. Morris, D. S. Hazelrigg, & Hobson & Hobson, Attorneys for Commonwealth of Kentucky, Appellee in Both Cases.

Filed June 17, 1931. W. B. O'Connell, C. C. A.

[fol. 532] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 17, 1931

Now comes the Southern Railway Company, the appellant in the above entitled cause, and says in connection with its appeal that in the record, proceedings and judgment herein manifest errors occurred and intervened to the substantial prejudice and greatly to the damage of the appellant, and that the judgment finally rendered and entered by the Court of Appeals of Kentucky herein on June 5, 1931, again- the defendant, Southern Railway Company, and in favor of the plaintiff, Commonwealth of Kentucky, is erroneous and unjust to the defendant for the following reasons, which the said appellant assigns as error and upon which it will rely in the prosecution of its appeal herein:

(1) The Court has not obeyed or carried out the mandate or the opinion of the Supreme Court of the United States in this cause, reported in 274 U. S. 76.

(2) With no new question of law or fact appearing in the record in this cause the court has affirmed and upheld the same judgment which has been reversed herein by the Supreme Court of the United States.

[fol. 533] (3) The Court erroneously assumed that this cause was reversed by the Supreme Court of the United States because of failure of the Commonwealth of Kentucky to plead or make claim for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company, when such reversal was upon the merits of the case and not upon any question of pleading or failure or defect in regard thereto.

(4) The Court erred in assuming that any special claim or pleading by the plaintiff, Commonwealth of Kentucky, for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company was necessary in order to cover or include any claim for franchise taxes that the Commonwealth of Kentucky might have had against the Southern Railway Company and the Director General of Railroads, or either of them.

(5) The Court erred in holding that the pleadings, stipulations of the parties and the record herein on the first appeal to the Supreme Court of the United States were not sufficient to present all claims of the Commonwealth of Kentucky for franchise taxes against the Southern Railway Company and the Director General of Railroads, or either of them, in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company as a part of the system of the Southern Railway Company.

(6) The Court erred in holding that Kentucky Statutes, sections 4077 to 4091, inclusive, and each of them, as construed, interpreted and applied by the Court of Appeals in this cause were not repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in deciding in favor of the validity of said statutes and each of them over such Constitutional objections interposed respectively by the appellant, Southern Railway Company. [fol. 534]

(7) The Court erred in holding that the assessments made and upheld for the years in controversy and each of them herein, for the purpose of franchise assessment and taxation did not have the effect of bringing into the State of Kentucky for the purposes of assessment and taxation property not in Kentucky and values appertaining to property not in Kentucky and income derived from property not

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in Kentucky, each and all of which holdings were contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States as claimed herein by the Southern Railway Company, the appellant, and as held by the Supreme Court of the United States in its opinion of reversal in this cause.

(8) The Court erred in holding that the adoption of the mileage plan of valuation for the Southern Railway System as applied to the assessment for franchise taxes for each of the years in controversy herein was not void because of the different character and value of the lines outside of Kentucky from the lines in Kentucky, which precluded the application of the per mile method as a basis of valuation, each and all of which holdings were contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, as claimed herein by the Southern Railway Company, the appellant, and as held by the Supreme Court of the United States in its opinion of reversal in this cause.

(9) The Court erred in holding that the assessment for franchise taxes and the tax for such purpose for each of the [fol. 535] years involved herein was not void because such additional assessment based on mileage outside the State of Kentucky was so arbitrary and unreasonable in amount and otherwise as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, as claimed herein by the Southern Railway Company, the appellant, and as held by the Supreme Court of the United States in its opinion of reversal in this cause.

(10) The Court erred in distributing the assessment of the franchise value found by the court to be due for each of the years in controversy herein from the defendant, Southern Railway Company, over the mileage of the Cincinnati, New Orleans & Texas Pacific Railway Company, because the franchise sought to be assessed was solely the franchise of the Southern Railway Company and not the franchise of the Cincinnati, New Orleans & Texas Pacific Railway Company, which last named company was not even a party to this proceeding, and because the Cincinnati, New Orleans & Texas Pacific Railway Company had fully paid all its franchise taxes for each of said years, each and all

of which holdings were contr-ry to the due process clause of the Fourteenth Amendment to the Constitution of the United States, as claimed herein by the Southern Railway Company, the appellant, and in conflict with the opinion of reversal rendered by the Supreme Court of the United States in this cause.

(11) The Court erred in holding that any assessment for franchise purposes or any tax levied thereon, or any lien therefor could be upheld or enforced against the Southern Railway Company or its property, or that any judgment for such taxes could be rendered against the Southern Railway [fol. 536] Company for the years in controversy herein, or either of them, inasmuch as it appeared that the property of the Southern Railway Company was, during each of the years here in controversy, in the possession and under the control and operation of the Director General of Railroads of the United States, each and all of which holdings were violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and the laws of the United States with relation to Federal control and operation of railroads, as claimed herein by the appellant, Southern Railway Company.

(12) The Court erred in holding that a penalty should be adjudged against the Southern Railway Company on account of failure to list its property for assessment and taxation during the year and each of them in controversy herein, the property of the Southern Railway Company during each of the taxable years in question being in the possession and under the control and operation of the Director General of Railroads of the United States under the proclamation of the President and the acts of Congress relating to Federal control and operation of railroads, and the Southern Railway Company being under no duty or obligation to return any of its property for assessment for said taxable years, or either of them.

Wherefore, appellant prays that the judgment rendered herein in favor of the Commonwealth of Kentucky and against the Southern Railway Company be reversed and that this court make such further order as may be mee — proper in the premises.

Edward P. Humphrey, Charles W. Milner, Attorneys for Appellant, Southern Railway Company.

[fol. 537] IN COURT OF APPEALS OF KENTUCKY

ASSIGNMENT OF ERRORS—Filed June 17, 1931

Now comes Andrew W: Mellon, Director General of Railroads of the United States, the appellant in the above entitled cause, and says in connection with his appeal that in the record, proceedings and judgment herein manifest errors occurred and intervened to the substantial prejudice and greatly to the damage of the appellant, and that the judgment finally rendered and entered by the Court of Appeals of Kentucky herein on June 5, 1931, against the defendant, Director General of Railroads of the United States, and in favor of the plaintiff, Commonwealth of Kentucky, is erroneous and unjust to the defendant for the following reasons, which the said appellant assigns as error and upon which he will reply in the prosecution of his appeal herein:

(1) The Court has not obeyed or carried out the mandate or the opinion of the Supreme Court of the United States in this cause, reported in 274 U. S. 76.

(2) With no new question of law or fact appearing in the record in this cause the court has affirmed and upheld the same judgment which has been reversed herein by the Supreme Court of the United States.

(3) The Court erroneously assumed that this cause was [fol. 538] reversed by the Supreme Court of the United States because of failure of the Commonwealth of Kentucky to plead or make claim for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company, when such reversal was upon the merits of the case and not upon any question of pleading or failure or defect in regard thereto.

(4) The Court erred in assuming that any special claim or pleading by the plaintiff, Commonwealth of Kentucky,

for taxes in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company was necessary in order to cover or include any claim for franchise taxes that the Commonwealth of Kentucky might have had against the Southern Railway Company and the Director General of Railroads, or either of them.

(5) The Court erred in holding that the pleadings, stipulations of the parties and the record herein on the first appeal to the Supreme Court of the United States were not sufficient to present all claims of the Commonwealth of Kentucky for franchise taxes against the Southern Railway Company and the Director General of Railroads, or either of them, in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company as a part of the system of the Southern Railway Company.

(6) The Court erred in holding that Kentucky Statutes, sections 4077 to 4091, inclusive, and each of them, as construed, interpreted and applied by the Court of Appeals in this cause were not repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in deciding in favor of the validity of said statutes and each of them over such Constitutional [fol. 539] objections interposed respectively by the appellant, Director General of Railroads.

(7) The Court erred in holding that the assessments made and upheld for the years in controversy and each of them herein, for the purpose of franchise assessment and taxation, did not have the effect of bringing into the State of Kentucky for the purposes of assessment and taxation property not in Kentucky and values appertaining to property not in Kentucky and income derived from property not in Kentucky, each and all of which holdings were contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States, as claimed herein by the Director General of Railroads, the appellant; and as held by the Supreme Court of the United States in its opinion of reversal in this cause.

(8) The Court erred in holding that the adoption of the mileage plan of valuation for the Southern Railway System as applied to the assessment for franchise taxes for

each of the years in controversy herein was not void because of the different character and value of the lines outside of Kentucky from the lines in Kentucky, which precluded the application of the per mile method as a basis of valuation, each and all of which holdings were contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, as claimed herein by the Director General of Railroads, the appellant, and as held by the Supreme Court of the United States in its opinion of reversal in this cause.

(9) The Court erred in holding that the assessment for franchise taxes and the tax for such purpose for each of the years involved herein was not void because such additional assessment based on mileage outside the [fol. 540] State of Kentucky was so arbitrary and unreasonable in amount and otherwise as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, as claimed herein by the Director General of Railroads, the appellant, and as held by the Supreme Court of the United States in its opinion of reversal in this cause.

(10) The Court erred in distributing the assessment of the franchise value found by the court to be due for each of the years in controversy herein from the defendant, the Director General of Railroads, over the mileage of the Cincinnati, New Orleans & Texas Pacific Railway Company, because the franchise sought to be assessed was solely the franchise of the Southern Railway Company and not the franchise of the Cincinnati, New Orleans & Texas Pacific Railway Company, which last named company was not even a party to this proceeding, and because the Cincinnati, New Orleans & Texas Pacific Railway Company had fully paid all its franchise taxes for each of said years, each and all of which holdings were contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, as claimed herein by the Director General of Railroads, the appellant, and in conflict with the opinion of reversal rendered by the Supreme Court of the United States in this cause.

(11) The Court erred in holding that any penalty could be assessed against the Director General of Railroads of

the United States because of any failure on his part to list for assessment for either of the years in controversy herein property of the Southern Railway Company which [fols. 541 & 542] was in the possession and under the control and operation of the Director General of Railroads during the taxable years in controversy herein, or that any penalty could be assessed against the Director General of Railroads on account of his failure to pay franchise taxes for said years, or either of them, the assessment of such penalties being in violation of the proclamation of the President and the laws of the United States relating to Federal control and operation of railroads, as well as other laws of the United States, as contended herein by the Director General of Railroads.

Wherefore appellant prays that the judgment rendered herein in favor of the Commonwealth of Kentucky and against the Director General of Railroads be reversed and that this court make such further order as may be meet and proper in the premises.

(Signed) Edward P. Humphrey, Charles W. Milner, Attorneys for Appellant, Andrew W. Mellon, Director General of Railroads of the United States.

[File endorsement omitted.]

[fol. 543] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR APPEAL BY SOUTHERN RAILWAY COMPANY—Filed June 17, 1931

The petitioner, the Southern Railway Company, appellant in the above entitled cause, respectfully shows by this petition and assignment of errors filed herewith that in the record, proceedings and decision of this court in this cause, the same being the highest court of the State of Kentucky in which a decision could be had in the suit and the decision therein being final, manifest errors have occurred, prejudicial to the substantial rights of the petitioner and greatly to its damage.

That as appears in the record and proceedings in this cause there was drawn in question the validity of statutes of the State of Kentucky, namely, Kentucky Statutes, 4077 to 4091, inclusive, on the ground that said statutes and each of them, as construed, interpreted and applied by the Court of Appeals of Kentucky in this cause, were repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and the decision of the Court of Appeals of Kentucky in this cause was in favor of the validity of said statutes, which decision was erroneous and prejudicial to the sub- [fol. 544] stantial rights of this petitioner and greatly to its damage.

That with no new question of law or fact appearing in the record in this cause the Court of Appeals of Kentucky has, as contended by the appellant, affirmed and upheld the same judgment which has been reversed herein by the Supreme Court of the United States in its opinion reported in 274 U. S. 76.

The opinion of the Court of Appeals of Kentucky was rendered and entered in this cause on March 27, 1931, and a petition for rehearing, duly filed by the said Southern Railway Company within the time allowed by law and within the time allowed by order of said court entered herein, which was entertained and considered by the court, was overruled on June 5, 1931, upon which last named date a mandate affirming the judgment of the lower court was issued.

Wherefore your petitioner, Southern Railway Company, prays for allowance of an appeal from the judgment rendered herein against it in favor of the Commonwealth of Kentucky to the Supreme Court of the United States and for such other and further process and proceedings as will enable your petitioner to obtain a review of this cause and a correction by the Supreme Court of the United States of the errors complained of herein and in the assignment of errors filed herewith, and also prays that an order be made fixing the amount of security or bond which the petitioner as appellant shall give and furnish upon said appeal, and that the bond or security thus executed and given and this appeal shall operate as a supersedeas and that all further proceedings in the Court of Appeals of Kentucky and the trial court, namely, the Woodford Circuit Court of Kentucky, be suspended and stayed until the final determination of said appeal by the Supreme Court of the United [fol. 545] States, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner prays for any further or other order that may be necessary in connection with this appeal ~~herein~~, or may be meet and proper in the premises.

Edward P. Humphrey, Charles W. Milner, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 546] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR APPEAL BY ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS OF THE UNITED STATES—Filed June 17, 1931

The petitioner, Andrew W. Mellon, Director General of Railroads of the United States, appellant in the above entitled cause, respectfully shows by this petition and assignment of errors filed herewith that in the record, proceedings and decision of this court in this cause, the same being the highest court of the State of Kentucky in which a decision could be had in the suit and the decision therein being final, manifest errors have occurred, prejudicial to the substantial rights of the petitioner and greatly to his damage.

That as appears in the record and proceedings in this cause there was drawn in question the validity of statutes of the State of Kentucky, namely, Kentucky Statutes, 4077 to 4091, inclusive, on the ground that said statutes and each of them, as construed, interpreted and applied by the Court of Appeals of Kentucky in this cause, were repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, [fol. 547] and the decision of the Court of Appeals of Kentucky in this cause was in favor of the validity of said statutes, which decision was erroneous and prejudicial to the substantial rights of this petitioner and greatly to his damage.

That with no new question of law or fact appearing in the record in this cause the Court of Appeals of Kentucky has, as contended by the appellant, affirmed and upheld the same judgment which has been reversed herein by the Supreme Court of the United States in its opinion reported in 274 U. S. 76.

The opinion of the Court of Appeals of Kentucky was rendered and entered in this cause on March 27, 1931, and a petition for rehearing, duly filed by the said Director General of Railroads within the time allowed by law and within the time allowed by order of said court entered herein, which was entertained and considered by the court, was overruled on June 5, 1931, upon which last named date a mandate affirming the judgment of the lower court was issued.

Wherefore your petitioner, Director General of Railroads, prays for allowance of an appeal from the judgment rendered herein against him in favor of the Commonwealth of Kentucky to the Supreme Court of the United States and for such other and further process and proceedings as will enable your petitioner to obtain a review of this cause and a correction by the Supreme Court of the United States of the errors complained of herein and in the assignment of errors filed herewith. Petitioner also prays for an order without the requirement of bond or security by the Director General of Railroads of the United States staying all further proceedings in this cause in the Court [fol. 548] of Appeals of Kentucky and in the trial court, the Woodford Circuit Court of Kentucky until the final determination of said appeal by the Supreme Court of the United States, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner prays for any further or other order that may be necessary in connection with this appeal herein, or may be meet and proper in the premises.

(Signed) Edward P. Humphrey, Charles W. Milner,
Attorneys for Petitioner.

[File endorsement omitted.]

[fols. 549 & 550] Citation, in usual form, showing service on J. P. Hobson, Filed June 17, 1931, omitted in printing.

[fol. 551] [File endorsement omitted]

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 17, 1931

The petition of the Southern Railway Company for an appeal in the above entitled cause from the Court of Appeals of Kentucky to the Supreme Court of the United States, and the assignment of errors filed therewith by the Southern Railway Company, and the record in this cause having been considered, and it appearing to the court that a petition for rehearing seasonably filed by the Southern Railway Company within the time allowed by law and by order of court entered herein, which was entertained and considered by the court, was overruled on June 5, 1931, upon which date a mandate was issued by the Court of Appeals of Kentucky, affirming the judgment of the lower court, namely, the Woodford Circuit Court of Kentucky, it is ordered as follows:

That an appeal as prayed in said petition be and is hereby allowed to the said petitioner, Southern Railway Company, to the Supreme Court of the United States from the final judgment entered and rendered herein by the Court of Appeals of Kentucky in favor of the appellee, Commonwealth of Kentucky, and against the petitioner (appellant), Southern Railway Company, which judgment [fol. 552] became final on June 5, 1931.

That the Clerk of the Court of Appeals of Kentucky prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within thirty (30) days from the date thereof;

That the said Southern Railway Company shall give good and sufficient security, to-wit, bond in the sum of Fifteen Thousand Dollars that the appellant, Southern Railway Company, shall prosecute its said appeal to effect, and if the said appellant fails to make its plea good it shall answer for all damages and costs herein.

The said appellant, Southern Railway Company, now presenting such bond in the sum of Fifteen Thousand ($15,000.00) Dollars with the United States Fidelity & Guaranty Company as surety, executed and conditioned as Company, shall prosecute its said appeal to effect, and it is hereby approved, and this appeal and said bond shall operate as a supersedeas and as a stay of all further proceedings in the Court of Appeals of Kentucky and in the trial court, the Woodford Circuit Court of Kentucky, pending the final determination of this cause on appeal by the Supreme Court of the United States.

It is further ordered that a copy of this order and of said bond, duly certified by the Clerk of the Court of Appeals of Kentucky, be sent by the Clerk of said last named court to the Woodford Circuit Court of Kentucky with directions to file same in the record there in this cause.

Gus Thomas, Chief Justice of the Court of Appeals of Kentucky.

[fol. 553] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 17, 1931

The petition of Andrew W. Mellon, Director General of Railroads of the United States for an appeal in the above entitled cause from the Court of Appeals of Kentucky to the Supreme Court of the United States, and the assignment of errors filed therewith by the Director General of Railroads, and the record in this cause having been considered, and it appearing to the court that a petition for rehearing seasonably filed by the Director General of Railroads within the time allowed by law and by order of court entered herein, which was entertained and considered by the Court, was overruled on June 5, 1931, upon which date a mandate was issued by the Court of Appeals of Kentucky, affirming the judgment of the lower court, namely, the Woodford Circuit Court of Kentucky, it is ordered as follows:

That an appeal as prayed in said petition be and is hereby allowed to the said petitioner, Director General of Railroads, to the Supreme Court of the United States from the final judgment entered and rendered herein by the Court of Appeals of Kentucky in favor of the appellee, Commonwealth of Kentucky, and against the petitioner (appellant), Director General of Railroads, which judgment became final on June 5, 1931;

That the Clerk of the Court of Appeals of Kentucky pre- [fols. 554 & 555] pare and certify a transcript of the record and proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within thirty (30) days from the date thereof;

That without the requirement of any bond or security by the Director General of Railroads all further proceedings in this cause in the Court of Appeals of Kentucky and in the trial court, the Woodford Circuit Court of Kentucky, be and are hereby stayed pending the final determination of the said appeal by the Supreme Court of the United States;

That a copy of this order, duly certified by the Clerk of the Court of Appeals of Kentucky, be sent by the Clerk of said last named court to the Woodford Circuit Court of Kentucky with directions to file same in the record there in this cause.

Gus Thomas, Chief Justice of the Court of Appeals of Kentucky.

[File endorsement omitted.]

[fols. 556-560] Bond on appeal for $15,000, approved and filed June 17, 1931, omitted in printing.

[fol. 561] In Court of Appeals of Kentucky

[Title omitted]

Præcipe for Transcript of Record—Filed June 17, 1931

To the Clerk of the Court of Appeals of Kentucky:

Please make transcript for the purposes of appeal of the following papers:

(1) The entire record filed in the Court of Appeals of Kentucky in the first appeal wherein the Commonwealth of Kentucky was appellant, and the Southern Railway Company and the Director General of Railroads were appellees, including exhibits B filed with the answer, except that the following pages only will be copied from the printed stockholders' reports:

[fols. 562 & 563] 1914—pages 17, 67, 69.
1915—pages 15, 68, 69.
1916—pages 55, 56.
1917—pages 57, 53.
1918—pages 19, 21.

(2) The entire record on the second appeal wherein the Southern Railway Company and the Director General of Railroads were appellants, and the Commonwealth of Kentucky was appellee, together with notations showing the respective dates upon which each of said transcripts of record were filed, and orders showing the placing of the first record with the second record.

(3) The opinions of the Court of Appeals on the first and second appeals.

For the purpose of identifying and copying all of the above, the Clerk may use the record of this cause as printed by the Clerk of the Supreme Court, marked "Filed December 3, 1924, (30, 723, 30, 724)" and further identified by the names of the respective counsel in this cause, a copy of which printed record is herewith furnished the Clerk..

(4) The entire record on the third appeal wherein the Southern Railway Company and the Director General of Railroads were appellants and the Commonwealth of Kentucky was appellee.

(5) All orders with reference to the petition for rehearing filed by the Southern Railway Company and the Director General of Railroads, with the date of filing, and order showing the extension of time for filing of the petition for rehearing.

(6) Petition for rehearing filed herein by the Southern Railway Company and the Director General of Railroads in the Court of Appeals of Kentucky on May 14, 1931.

(7) Opinion of the Court of Appeals on the third appeal rendered March 27, 1931.

(8) All papers filed and orders made with reference to the appeals now being prosecuted by the Southern Railway

Company and the Director General of Railroads from the Court of Appeals of Kentucky to the Supreme Court of the United States.

(Signed) Edward P. Humphrey, Charles W. Milner, Attorneys for Andrew W. Mellon, Director General of Railroads, and Southern Railway Company.

[File endorsement omitted.]

[fols. 564 & 565] Citation, in usual form, showing service on J. P. Hobson, filed June 17, 1931, omitted in printing.

[fol. 566] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER EXTENDING TIME—Filed June 23, 1931

It appearing to the Court that the transcript of the record in this case for the purposes of appeal to the Supreme Court of the United States cannot be prepared rapidly on account of its size and the tabulations therein contained and that the Clerk of the Court of Appeals of Kentucky is temporarily overwhelmed with work, it is, therefore, ordered by the Court, upon motion of the appellants, Southern Railway Company and Andrew W. Mellon, Director General of Railroads of the United States that they and each of them be given ninety days from and after June 5, 1931, within which to secure and file in the Clerk's office of the Supreme Court of the United States a transcript of the record and proceedings herein.

(Signed) Gus Thomas, Chief Justice Court of Appeals of Kentucky.

(Signed) Edward P. Humphrey, Charles W. Milner, Attorneys for Appellants, Southern Railway Company and Andrew W. Mellon, Director General of Railroads of the United States.

Agreed to.

(Signed) J. P. Hobson, &c., Attorneys for Appellee, Commonwealth of Kentucky.

[File endorsement omitted.]

[fol. 567] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 568] IN SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS TO BE RELIED ON AND PARTS OF RECORD TO BE PRINTED—Filed Aug. 17, 1931

Appellants, Andrew W. Mellon, Director General of Railroads of the United States, and the Southern Railway Company, will rely upon the following points:

(1) This is the second appeal of these cases to this court. The Court of Appeals of Kentucky has not obeyed or carried out the mandate or opinion of the Supreme Court of the United States in these cases, reported in 274 U. S., 76.

(2) With no new question of law or fact appearing in the record the Kentucky Court of Appeals has affirmed the same judgment which had been reversed by this court.

In 274 U. S. 76, this court held that an additional franchise assessment against appellants of $1,730,090.02 for [fol. 569] 1918 and $3,028,592.62 for 1919 was unconstitutional. The judgment of the Kentucky Court of Appeals from which this appeal is prosecuted affirms an additional franchise assessment for these exact amounts, to-wit, $1,730,090.02 for 1918 and $3,028,592.62 for 1919.

The method, basis of calculation and every figure used in making the calculation that was reversed by the Supreme Court are the same in the judgment from which this appeal is prosecuted.

(3) The State Court erroneously assumed that this cause was reversed by this court because of a failure on the part of the Commonwealth of Kentucky to make a claim for taxes in respect of one of a large number of controlled roads, i. e., the Cincinnati, New Orleans & Texas Pacific Railway Company.

The reversal by this court was upon the merits of the case and not upon any technical question of pleading.

(4) The State Court erred in assuming that any special claim or pleading by the Commonwealth of Kentucky with respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company was necessary in order to include

any claim for franchise taxes against appellants or either of them.

During each of the years in question appellants controlled, within the meaning of Kentucky franchise tax statutes, a large number of railroads. The Kentucky franchise tax statutes and the decisions of the Kentucky Court of Appeals and of this court made it necessary to include [fol. 570] all figures with reference to each of such controlled roads in figuring appellant's franchise taxes without specifying any of such controlled roads in any pleading. Therefore, no pleading was necessary with reference to one of such controlled roads, to-wit, the Cincinnati, New Orleans & Texas Pacific Railway Company.

(5) All facts and figures with reference to the Cincinnati, New Orleans & Texas Pacific Railway Company and of other controlled roads were stipulated in the record on the prior appeal to this court. Under the decisions of this court and of the Kentucky Court of Appeals a stipulation takes the place of both pleadings and proof, even if pleadings with reference to the Cincinnati, New Orleans & Texas Pacific Railway Company were necessary.

The State Court erred in holding that the pleadings, stipulations of the parties and the record on the prior appeal to this court were not sufficient to present all claims of the Commonwealth of Kentucky for franchise taxes against appellants in respect of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company.

(6) The State Court erred in holding that Kentucky Statutes, sections 4077 to 4081, inclusive, as construed, interpreted and applied in this cause, were not repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(7) The assessments which the State Court upheld for [fol. 571] the years in question had the effect of bringing into Kentucky for the purposes of assessment and taxation property not in Kentucky and values appertaining to property not in Kentucky and income derived from property not in Kentucky, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(8) The mileage plan of valuation and assessment adopted by the State Court was contrary to the due process

clause of the Fourteenth Amendment to the Federal Constitution because of the different character and value of the lines of appellant outside of the State of Kentucky from its lines within the State of Kentucky.

(9) The "system" plan of taxing a common carrier whose lines extend within and without a particular State is one permitted where nothing else appears and it can therefore be assumed that the property within and without the State is of equal value.

The "system" plan of taxation cannot be so extended as to bring into a State property or values outside of the State.

(10) The "system" plan of taxation and resulting assessment of the State Court is so arbitrary and so grossly excessive as to be in conflict with the Fourteenth Amendment to the Federal Constitution.

(11) The only railroad defendant in the suits by the Com- [fol. 572] monwealth of Kentucky was the appellant, Southern Railway Company. It was the franchise valuation of the appellant, Southern Railway Company that was sought to be assessed. The Cincinnati, New Orleans & Texas Pacific Railway Company was not even a party to the proceedings. No recovery was or could have been sought against it because the Cincinnati, New Orleans & Texas Pacific Railway Company had theretofore paid taxes on a per mile franchise valuation very largely in excess of the per mile franchise valuation of the appellant, Southern Railway Company. The State Court erroneously distributed the amount which it found to be the value of the appellant's franchise over the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company, contrary to the due process clause of the Fourteenth Amendment to the Federal Constitution.

(12) During the years in question the property of appellant, Southern Railway Company, and all other railroads had been taken over and were being operated by the Government of the United States through the Director General of Railroads. During such Federal control, franchise tax, even if constitutionally assessed, was a liability of the Director General, and it was error to assess such tax against the railroad corporation.

(13) The State Court erred in assessing a twenty per cent penalty against the Director General of Railroads or against the Southern Railway Company under the existing conditions.

There was no testimony taken in this cause orally or by deposition. The record consists of pleadings, stipulations, exhibits, judgments, opinions of the Court of Appeals of [fols. 573 & 574] Kentucky and petitions for rehearing in the Court of Appeals of Kentucky. The entire record is necessary for the presentation of the points relied on upon this appeal. We, therefore, ask that the Clerk of the Supreme Court have the entire record printed, including the record upon the first appeal to the Supreme Court of the United States, as well as all proceedings since.

Edward P. Humphrey, Charles W. Milner, Attorneys for Appellants, Andrew W. Mellon, Director General of Railroads, and Southern Railway Company. L. E. Jeffries, S. R. Prince, Washington, D. C., of Counsel.

The Appellee, Commonwealth of Kentucky, acknowledges the receipt of a copy of the foregoing appellants' statement of points to be relied on and parts of record to be printed this 14 day of August, 1931.

J. P. Hobson, Attorney for Appellee, Commonwealth of Kentucky.

[fol. 575] [File endorsement omitted.]

Endorsed on cover: File Nos. 36,114, 36,115. Kentucky Court of Appeals. Term No. 300. Southern Railway Company, appellant, vs. Commonwealth of Kentucky. Term No. 301. Andrew W. Mellon, Director General of Railroads, appellant, vs. Commonwealth of Kentucky. Filed August 17, 1931. File Nos. 36,114, 36,115.

SEP 21 19
CHARLES ELMORE CR
CL

No. 300 - 301

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY - - *Appellant,*

vs.

COMMONWEALTH OF KENTUCKY - - *Appellee.*

ANDREW W. MELLON, Director General of Railroads - - - - - - *Appellant,*

vs.

COMMONWEALTH OF KENTUCKY, EX REL., ETC., *Appellee.*

MOTION TO ADVANCE

The Commonwealth of Kentucky moves the court to advance this case on the following grounds:

This is the second appeal of this case to this court; for opinion on former appeal, see Southern Railway v. Kentucky, 274 U. S. 76. The case involves the taxes claimed by the state of Kentucky for the years 1917 and 1918. It was instituted March 8, 1920. Judgment was entered in the Woodford Circuit Court in favor of the railway, and was reversed on appeal: see Commonwealth, by etc. v. Southern Railway, 193 Ky. 474. On the return of the case to the circuit court, judgment was entered for the state, and this was affirmed, although the judgment in another case heard with it for the years 1914, 1915 and 1916 was reversed: See Southern Railway v. Commonwealth, 214 Ky. 388. The railway company appealed from the judgment in this case to this court, and the judgment was there reversed: as above cited, 274 U. S. 76. On the return of the case to the circuit court additional pleadings were filed and the issues made up. Judgment was entered for the Commonwealth in the same amount as in the former judgment. An appeal from that judgment was affirmed: Southern Railway v. Commonwealth, 238 Ky. 638. The railway company has appealed to this court. In view of the fact that public taxes are involved and that this is the second appeal to this court; and that this litigation has lasted since 1920, we earnestly ask that the cause be advanced and heard on an early day to be fixed by the court.

J. P. Hobson,
For Appellee

J. W. Cammack,
Attorney General of Counsel.

Received of J. P. Hobson, a copy of the above motion to advance with grounds therefor; and notice is accepted that said motion will be entered on the first day of the October term, 1931, of said court. This 10th day of September, 1931.

Humphrey, Crawford & Middleton,
For Appellants.

Nos. 300 - 301

AUG 20

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, - - - - Appellant,

versus

COMMONWEALTH OF KENTUCKY, EX REL. &c., - Appellee.

ANDREW W. MELLON, Director General of
Railroads, - - - - - - - - Appellant,

versus

COMMONWEALTH OF KENTUCKY, EX REL. &c., - Appellee.

APPELLANTS' BRIEF ON JURISDICTION AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI.

EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Louisville, Kentucky,
Counsel for Appellants.

L. E. JEFFRIES,
S. R. PRINCE,
Washington, D. C.,
Of Counsel.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

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2. With no new fact in the record the State Court has affirmed the identical judgment that was reversed by this Court. 1

3. The first appeal to this Court was prosecuted on the ground that Kentucky Statutes, 4077-4081, as construed and applied by the Court of Appeals of Kentucky in assessing a franchise tax amounted to a denial of the rights of appellants under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

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5. The present appeal is based upon United States Code, Title 28, section 344, paragraph (a), which allows an appeal where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity 3

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Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, EX REL., &C., *Appellee.*

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, EX REL., &C., *Appellee.*

APPELLANTS' BRIEF ON JURISDICTION AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI.

This is the second appeal of these two cases from the Court of Appeals of Kentucky. On the first appeal this court reversed the judgment of the State Court in 274 U. S. 76. The cases have always been heard together.

The Court of Appeals of Kentucky has affirmed exactly the same judgment that was reversed by the Supreme Court of the United States without any new fact appearing in the record and without any change in the facts.

This is a proceeding by the Commonwealth of Kentucky to collect franchise taxes from the appellants arising during the period of Federal control of railroads.

All of the lines of railroad controlled by the Southern Railway Company operating in Kentucky have already paid taxes on their tangible properties and franchise.

The first appeal to this court was prosecuted on the ground that the Statutes of Kentucky under which the Commonwealth is undertaking to collect these taxes, namely, Kentucky Statutes, 4077 to 4081, inclusive, as construed and applied by the Court of Appeals of Kentucky (the State court of last resort) amounted to a denial of the rights of the appellants under the due process clause of the Fourteenth Amendment to the Constitution of the United States. The court took jurisdiction on that ground and reversed the cases on their merits, holding that the point was well taken.

The present appeal is prosecuted on the same ground.

This court in its previous opinion (274 U. S. 76) said:

> "A judgment against plaintiffs in error for franchise taxes imposed under the laws of Kentucky in respect of certain lines of railway was affirmed by the highest court of that State. 204 Ky. 388. And see 193 Ky. 474. Reversal is sought on the ground that as applied these laws contravene the due process clause of the Fourteenth Amendment."

The writs of error on the first appeal were sued out on October 16, 1924 (Folios 338 and 347). The plaintiffs in error also prayed in the alternative for a writ of certiorari and petitioned the court accordingly.

This court in 274 U. S. 86, said:

> "A petition for certiorari was filed, but, as the case is properly here on writ of error, the petition will be denied.
>
> *"Judgment reversed on writ of error. Petition for certiorari denied."*

The Jurisdictional Act of 1925 enacted by Congress did not take away from a litigant his right of appeal from the court of last resort of a State to the Supreme Court of the United States where there was drawn in question the validity of a State statute on the ground of its being repugnant to the Constitution of the United States and where the decision of the State court was in favor of the validity of such statute.

Of course we no longer have writ of error as appeal has been substituted in all cases where writ of error was formerly employed.

The present appeal is based upon U. S. Code, Title 28, section 344, paragraph (a), which allows appeal as a matter of right where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity. This is the appellants' case exactly. We now contend (just as this court has heretofore decided) that the Statutes of Kentucky, under which the Commonwealth of Kentucky is undertaking to collect the taxes in controversy, as construed and applied by the State court of last resort deprive the appellants of their property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

There has been no change in Judicial Code, section 237, now U. S. Code, Title 28, section 344, which affects the right of appeal in this case. As we see it the appellants have exactly the same right of appeal now that they had when the case was first taken to this court.

Therefore

(a) The statutory provision believed to sustain the jurisdiction of this court is U. S. Code, Title 28, section 344.

(b) The judgment of the Court of Appeals of Kentucky became final on June 5, 1931, when the appellants' petition for rehearing which had been seasonably filed, entertained and considered, was overruled and mandate of reversal issued (Folio 528). Chicago, Great Western R. Co. v. Basham, 249 U. S. 164.

The opinion of the Court of Appeals of Kentucky on the last appeal to that court is contained in the record (Folios 430 to 468, inclusive) (238 Ky. 638).

The date upon which the applications for appeal were presented to the Court of Appeals of Kentucky was June 17, 1931 (Folios 543, 546), and the appeals were then allowed (Folios 551 and 553).

The time for filing the record in the Supreme Court of the United States was extended on June 23, 1931, for ninety days from and after June 5, 1931, by order signed by the Chief Justice of the Court of Appeals of Kentucky, who was the judge that signed the citations (Folio 566).

This was done in accordance with the provisions of United States Supreme Court rule 11. A certified copy of this order was promptly filed in this court.

(c) The nature of the case is shown by the former opinion of this court (274 U. S. 76) and also by the judgment entered by the Woodford Circuit Court of Kentucky on November 2, 1928 (Folios 414 to 420, inclusive), which was affirmed by the Court of Appeals of Kentucky in its opinion (Folios 430 to 468, inclusive) (238 Ky. 638), being a proceeding by the Commonwealth of Kentucky to collect franchise taxes from the appellants, Southern Railway Company and Director General of Railroads.

This court in 274 U. S. 76-80, reversed as unconstitutional an assessment for franchise taxes against appellants for 1918 amounting to $1,730,090.02 and for 1919 amounting to $3,028,592.62. The judgment of the Woodford Circuit Court which was affirmed by the Court of Appeals of Kentucky and from which this appeal is taken fixed a franchise assessment against appellants for 1918 amounting to $1,730,090.02 and for 1919, $3,028,592.62 (Folios 416 and 418). It will be seen that the assessments involved on the first appeal to this court are precisely the same as those involved on the present appeal. These assessments and the final judgment upholding same are attacked as contrary to the due process clause of the Fourteenth Amendment to the Federal Constitution in appellants' assignments of errors (Folios 532 and 537).

The jurisdiction of this court is sustained by U. S. Code, Title 28, section 344, paragraph (a), and the opinion of this court in 274 U. S. 76, construing similar provisions with regard to right of appeal contained in Judicial Code, 237.

The Court of Appeals of Kentucky in its last opinion (Folios 430 to 468, inclusive) (238 Ky. 638) took the position that this court had reversed these cases on the former appeal on account of a defect in the pleadings of the Commonwealth, which has been cured since, when, as will be clearly seen from the opinion rendered by this court above referred to, the cases were not reversed at all on any question of pleading but on the merits.

The reason given by the Court of Appeals of Kentucky for sustaining a judgment which was exactly like the one that this court reversed is based upon a misconception of the following language contained in the opinion rendered by this court in 274 U. S. 81:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific."

However, when we read this sentence with its context it can be readily seen that this court was not referring to any question of pleading:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earn-

ings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto."

The Commonwealth, however, seized upon the language used in the sentence first above quoted and urged upon the Woodford Circuit Court and the Court of Appeals of Kentucky the idea that the cases had been reversed because of an omission in pleading on the part of the Commonwealth, and this view was adopted by the State courts.

The only change which the Commonwealth made in the record after this case was reversed by the Supreme Court of the United States was to file a pleading stating that the Commonwealth did claim taxes with respect of the lines of the Cincinnati, New Orleans & Texas Pacific (Folio 361), when as a matter of fact the Cincinnati, New Orleans & Texas Pacific was not a defendant to the case and it was no more necessary to mention it in the pleadings than any of the other numerous roads which were held to be controlled by the Southern Railway.

To this amendment the appellants filed a responsive pleading again fully raising the constitutional questions relied on (Folio 373), which the Court of Appeals of Kentucky in its last opinion (Folio 430) expressly passed upon adversely to the appellants, the questions in regard thereto being fully covered by assignments of errors filed by the appellants in connection with this appeal (Folios 532, 537).

The stipulation filed in the Woodford Circuit Court just before the last judgment was entered shows that the assessments for the years in controversy on the first appeal to this court were made up exactly as contended by appellants in this court (Folios 406, 407, 408 and 409). A comparison of the figures used in this stipulation with the figures used in the final judgment from which this appeal is prosecuted (Folios 415, 416, 417 and 418) show that the two sets of figures are identical. There has been no change in the figures used or the method of calculation or in the amounts finally arrived at.

Furthermore, all the facts with reference to the Cincinnati, New Orleans & Texas Pacific were in the record by stipulation when the cases came to this court on the first appeal on writ of error, and this court and the Court of Appeals of Kentucky have held that a stipulation takes the place of both pleadings and proof on the matters covered thereby. Saltonstall v. Russell, 152 U. S. 628; Lincoln County, etc., v. Board of Trustees, 225 Ky. 21-24.

It is unnecessary to look further than the opinion of this court on the first appeal (274 U. S. 76) to show that the cases were reversed on the merits and not on any question of pleading, but we will simply quote the language used in the petition for rehearing filed in this court shortly after its decision was rendered by the Commonwealth of Kentucky through its counsel.

This is what the Commonwealth of Kentucky said in its petition for rehearing when it was trying to get this court to withdraw its opinion of reversal which it had delivered in these cases.

> "These pleadings and this stipulation of facts have always been treated by all parties to this controversy as entirely sufficient to raise the question whether the facts as stated were sufficient to warrant a basis of unit taxation of the entire system, including the C. N. O. & T. P. for the two years mentioned. The question was never raised as to the sufficiency of these pleadings and stipulations. They were always treated as bringing the question fairly and squarely before the court by counsel for both sides and there never has been any exception or question made of the fact that the State of Kentucky was laying a claim for taxes in respect of the C. N. O. & T. P. Railway.
>
> "We submit that the statement in the opinion of this court that there was no claim for any taxes in respect of this line is a serious misstatement of the facts contained in the record. Taxes have always been claimed since these pleadings went into the record and it has always been admitted that if the pleadings and stipulations were sufficient to make out a case then the case was established they were put in for the purpose of testing whether the case really existed."

The Court of Appeals of Kentucky, in affirming the identical judgment that had been reversed by this court, gives two reasons: (1) That the claim for taxes with respect of the lines of the C. N. O. & T. P. is a new matter. This, we submit, has been shown to be without merit. (2) That for a long time past all railroad property in Kentucky has been assessed on the same basis that this court, as applied to these appellants, has held to be unconstitutional.

The Court of Appeals of Kentucky does not seem to have been able to reconcile itself to the principle announced by this court, namely, that a method for arriving at franchise assessment which might be fair and equitable under certain conditions may be arbitrary, excessive and unconstitutional as applied to other conditions, such as appear in the case at bar.

The mandate of this court reversing the final decision of the Court of Appeals of Kentucky remanded the cases to the State Court with directions for further proceedings not inconsistent with the opinion of this court. We submit that the proceedings had in the State courts since such reversal are absolutely inconsistent with the opinion rendered by the Supreme Court of the United States and cannot possibly be reconciled therewith. It is inconceivable that with no change in the facts the same judgment could be rendered and upheld by the State courts which had theretofore been reversed by the Supreme Court of the United States.

We are firmly convinced that the appellants are entitled to an appeal under U. S. Code, Title 28, section 344, paragraph (a), and we ask that this court take jurisdiction accordingly upon the appeal allowed by the lower court, but in order to make assurance doubly sure we ask that if for any reason that does not occur to us this court should determine that the appellants are not entitled to an appeal, these papers be taken as a petition for a writ of certiorari under U. S. Code, Title 28, section 344, paragraph (c), and that the writ be allowed accordingly under paragraph (b) of section 344, Title 28, U. S. Code.

Respectfully submitted,

Edward P. Humphrey,
Charles W. Milner,
Louisville, Ky.,
Counsel for Appellants.

L. E. Jeffries,
S. R. Prince,
Washington, D. C.,
Of Counsel.

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NOV
CHARLES

Supreme Court of the United States

OCTOBER TERM, ———.

Nos. 300 and 301.

SOUTHERN RAILWAY COMPANY, - - - Appellant,

versus

COMMONWEALTH OF KENTUCKY, By, &c., - - Appellee.

ANDREW W. MELLON, Director General of Railroads, - - - - - - - Appellant,

versus

COMMONWEALTH OF KENTUCKY, By, &c., - Appellee.

BRIEF FOR APPELLANTS.

L. E. JEFFRIES,
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EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Louisville, Kentucky,
Counsel for Appellants.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

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3. With no new fact in the record, the State Court has affirmed the identical judgment that was reversed by this Court 2

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Supreme Court of the United States

OCTOBER TERM, ———.

Nos. 300 and 301.

SOUTHERN RAILWAY COMPANY, - - - *Appellant,*

v.

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ANDREW W. MELLON, DIRECTOR GENERAL
OF RAILROADS, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, BY, &c., - *Appellee.*

BRIEF FOR APPELLANTS.

The opinion of the Court below is reported in 238 Ky. 638.

The appellants have heretofore filed brief on jurisdiction and alternative petition for writ of certiorari. These matters will not be again discussed in this brief.

STATEMENT.

This is the second appeal of this case. The prior opinion of this Court is reported in 274 U. S. 76. For the convenience of the Court a copy of the opinion is filed as an appendix to this brief.

The suit was by the Commonwealth of Kentucky to recover alleged omitted franchise taxes from the appellant, Southern Railway Company (a Virginia corporation), and from the Director General of Railroads for the years 1918 and 1919. The Kentucky Court of Appeals in 204 Ky. 388 affirmed a judgment fixing the value of the omitted part of such franchise at $1,730,090.02 for 1918, and at $3,028,592.62 for 1919. On appeal this Court reversed that judgment because the amounts were arbitrarily excessive and included values beyond the limits of Kentucky and were therefore violative of the Fourteenth Amendment (274 U. S. 76).

The present appeal is from a decision of the Kentucky Court of Appeals (R. 290), (238 Ky. 638), which affirms a judgment fixing the value of appellant's omitted franchise for 1918 at $1,730,090.02, and for 1919 at $3,028,592.62.

The Kentucky Court of Appeals has therefore affirmed a judgment which is identical in amount with the judgment that was reversed by this Court. No new fact appears in the present record that would justify this utter disregard of the prior opinion of this Cour

Not only is the present judgment identical amount, but it is also identical in method, basis of calculation, and identical in every other respect with the judgment that was reversed in 274 U. S. A comparison of the figures used to make up the prior judgment (Stipulation 3, R. 270) with the figures used to make up the present judgment (R. 279) will show that the figures, method and basis of calculation in the present judgment is a verbatim copy of the figures, method and basis of calculation in the reversed judgment.

On the prior appeal, the calculation used by the State Court in arriving at the alleged omitted value of appellant's franchise was not included in the record, but was furnished this Court in our brief. These figures and the method of calculation were, as stated in the opinion of Justice Brandeis, protested by counsel for the Commonwealth. When the case was returned to the State Circuit Court, counsel for the Commonwealth stipulated (R. 270) the calculation and figures on which the prior judgment was based. This stipulation shows that the figures and calculations used in the reversed judgment are the exact figures and calculations which we furnished the Court in our brief on the first appeal.

The figures and calculations used by the Court in arriving at the present judgment are included in the judgment (R. 279). A copy of the stipulation showing the figures and method of calculation used in the prior judgment and an extract from the present judgment showing the figures and method of calculation used in the present appeal are filed as a supplement to this brief. It will be seen that the figures and calculations used in the judgment that was reversed are similar in each and every respect with the figures and calculation used in the present judgment.

We submit that it is most unusual for a State Court to thus overrule a decision of this Court on a question of constitutional law.

Instead of making our own statement of the facts and questions involved on the first appeal and which are the same as on the present appeal, we adopt in the interest of clarity and brevity the language of this Court in 274 U. S. 76-77:

"A judgment against plaintiffs in error for franchise taxes imposed under the laws of Kentucky in respect of certain lines of railway was affirmed by the highest court of that State. 204 Ky. 388. And see 193 Ky. 474. Reversal is sought on the ground that as applied these laws contravene the due process clause of the Fourteenth Amendment.

"The statutes* (§§4077-4081) provide that every foreign or domestic railway company, in addition to other taxes imposed by law, shall pay an annual tax on its franchise. The provisions apply whether the privilege is exercised by the corporation in its own name or in the name of another which it adopts. A company's railway system is deemed to include lines operated, leased or controlled whether technically owned or not. The tax is on intangible property. Where the railroad is partly within and partly without the State, the value of the intangible property so to be taxed may be determined substantially as follows: capitalize the net railway operating income of the entire system for the accounting year last ended; assign to Kentucky its mileage proportion of that amount; deduct the assessed value of the tangible property otherwise taxed; and the remainder is the value taken as the basis for the franchise taxes. When the railroad is wholly within the State, the capitalized net, less the assessed value of tangible property on which other taxes are paid, is taken to be the value of intangible property. *Greene* v. *Louis. & Interurban R. R. Co.,* 244 U. S. 499, 510, and cases cited; *Louis. & Nash. R. R. Co.* v. *Greene,* 244 U. S. 522, 539.

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*The provisions are printed in the margin of Louis. & Nash. R. R. Co. v. Greene, 244 U. S. 522, at page 533.

"Plaintiff in error, the Southern Railway Company, is a Virginia corporation. The lines of its system of railroads, exclusive of the Kentucky mileage in question, exceed 9,500 miles and extend from Washington, D. C., into Virginia, the Carolinas, Tennessee, Georgia, Florida, Alabama and Mississippi. The company also has a line from New Albany, Indiana, to East Saint Louis, Illinois. It does not own any railroad in Kentucky. The 'Southern Railway Company in Kentucky' owns 127.63 miles, all of which are in that State. Its branches connect with the line of the Cincinnati, New Orleans and Texas Pacific Railway Company which extends from Cincinnati to Chattanooga and connects it with the system. Its stock is owned by the Virginia company. The same persons are officers of both. The lines of the Kentucky company are reported to public authorities and are advertised as a part of the system. The Mobile and Ohio Railroad Company, the

Cumberland Railroad Company and the Cumberland Railway Company own, in all, about 53.3 miles of railroad in Kentucky, but their lines are not connected with the lines of the Southern Railway Company in Kentucky. The Virginia company through stock ownership controls these companies; but they and the Southern Railway in Kentucky, in their own names and as owners, made reports and paid in full all taxes assessed under Kentucky laws on their tangible and intangible properties.

"The Commonwealth brought this suit against the Virginia company and the Director General to recover additional franchise or intangible property taxes for 1918 and 1919 in respect of the Kentucky mileage of these companies. The Court of Appeals held that there was no such connection or unity of use between the system of the Virginia company and the lines of the Mobile and Ohio, the Cumberland Railroad and the Cumberland Railway as would justify recovery of any franchise taxes in respect of their Kentucky mileage. Stipulated facts tended to show that the Virginia company controlled the Cincinnati, New Orleans and Texas Pacific; and the court held that by means of its lines the railroad of the Southern Railway in Kentucky was so connected with the lines of the Virginia company as to be a part of the system. The value of intangible property adjudged to have been omitted, and on which the additional franchise taxes were calculated for 1918 was $1,730,090.02 and for 1919 was $3,028,592.62. These amounts were arrived at as follows: the net railway operating income for the entire system was capitalized at seven per cent; there was deducted an amount to cover the value of shops, terminals and double tracks outside Kentucky in excess of corresponding tangible property connected with the lines in that State; there was allocated to Kentucky such proportion of the remainder as 424.61 miles, which were attributed to Kentucky, bore to the total mileage of the system; that amount was equalized for taxation at 75 per cent. for 1918 and at 85 per cent. for 1919; and from the result there was deducted the values of tangible and intangible property (including the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific) on which taxes had been paid. But the average value per mile so deducted was less than the system average per mile. The amounts so arrived at were assigned to the 127.63 miles of the Southern Railway Company in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans and Texas Pacific. The increase per mile for 1918 was $5,334.55 and for 1919 was $9,338.34.

"The Court of Appeals rightly declared that a State may tax property permanently within its jurisdiction belonging to one domiciled elsewhere and used to carry on commerce among the States; that, where property is a part of a system and has its actual use only in connection with other parts of the system, that fact may be considered even though other parts of the system are outside the State; that the State may not tax property outside its jurisdiction belonging to one domiciled elsewhere, and that the mileage basis of apportionment cannot be adopted in the taxation of railroad franchises where the result is shown to be arbitrarily excessive. These propositions are derived from the decisions of this court. *Fargo* v. *Hart,* 193 U. S. 490, 499; *Pittsburg, &c., Railway Co.* v. *Backus,* 154 U. S. 421, 427-431; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 282; *Wallace* v. *Hines,* 253 U. S. 66, 69.

"The question is whether the State made valid application of the governing principles. The value of tangible property is not involved in this case. The demand of the Commonwealth against the plaintiffs in error was for taxes on intangible properties over and above the amounts that had been paid by the owning companies. And the entire amount added as a basis for additional taxes is attributable only to the lines of the Southern Railway Company in Kentucky. There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto. The Mobile and Ohio, the Cumberland Railroad and the Cumberland Railway were held not to be a part of the system. Plaintiffs in error insist that the enforcement of the taxes on these amounts, as measuring the additional values of intangible properties inhering in the lines of the

Southern Railway Company in Kentucky, operates to tax the property of the Virginia company located beyond the borders of Kentucky and that such amounts are arbitrarily excessive.

"The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation. *Smyth* v. *Ames,* 169 U. S. 466, 547. Much weight is to be given to present and prospective earning capacity at rates that are reasonable having regard to traffic available and competitive and other conditions prevailing in the territory served. No intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called. See *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202.

"The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway Company in Kentucky of $13,555 per mile for 1918 and of $23,730 for 1919. The 1917 average net operating income per mile for the system was the basis for determining the Kentucky franchise taxes for 1918, and the average for 1918 controlled the amount of the 1919 taxes. The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918. The corresponding net income per mile of the Southern Railway Company in Kentucky for 1917 was $878. There was a loss of $4,741 per mile in 1918. The record also shows a loss in each of the years 1914, 1915 and 1916. The average for the five years was a loss of $1,230 per mile per year.

"If considered alone, the railroad of the Southern Railway Company in Kentucky would be a losing venture. Its operating loss was more than $157,000 per year for the average of the five years reported in the record. But, assuming it a part of the system, it is right to take into consideration the parts outside the State that are operated in connection with it. The mileage used as an integral part of a railroad system may have elements of value that it otherwise would not possess, and the State properly may have regard to the whole in order to ascertain the value of the part that is within its borders. *Fargo* v. *Hart, supra,* 499. But, if the method pursued in valuing property within the State is arbitrary and the resulting valuation is grossly excessive, the tax must be condemned as in contravention of the due process clause of the Fourteenth Amendment. *Union Tank Line Co.* v. *Wright, supra,* 282, and cases cited. It is not permissible for the State to take into account any of the outside property 'unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.' *Wallace* v. *Hines, supra,* 69.

"The operating results of the system compared with those of the Southern Railway Company in Kentucky show that, on the basis of valuation adopted by the State, the average value per mile of the lines of that company is very much less than the average value per mile of the system. If taken separately it is clear that, because of lack of net earnings, no substantial intangible elements of value could reasonably be attributed to the railroad of that company. In order to justify the increases made, there would have to be attributed to these lines large amounts from system earnings. To sustain the addition for 1919, it is necessary to take enough to overcome the deficit of $4,741 per mile plus a fair return on the value of the physical property and on the $23,730 per mile fixed as a basis for additional taxes. The draft on earnings from other parts of the system to sustain the increase for 1918 would not be so heavy. But it is equally obvious that there is no foundation for the finding that there existed in these lines intangible values of $1,730,090 or any other substantial amount in excess of the value fairly to be attributed to the physical elements of the railroad. If intangible elements were attributed to the system at the same rate per mile as results from the distribution of the added amount to the mileage of the Southern Railway in Kentucky, their value would be more than $200,000,000 for 1919 and more than $120,000,000 for 1918. Clearly there is no foundation for any such results. The mere statement of the figures is sufficient to show that the amount added as a basis for franchise taxes is so excessive and unreasonable that it cannot be sustained; and such an application of the system earnings amounts to an attempt to tax property outside the State. And as the direct earnings per mile of the lines of that company are so much less than the average for the system, it is plain that the amount adjudged to have been omitted was arbitrarily excessive and included values of system property beyond the limits of Kentucky. * * *

"The enforcement of the franchise taxes so assessed would violate the due process clause of the Fourteenth Amendment."

On account of what transpired in the State Court after the above opinion, we call especial attention to a few pertinent points in the opinion:

1. "A company's railway *system* is deemed to include lines operated, leased or controlled whether technically owned or not. The tax is on intangible property. Where the railroad is partly within and partly without the State, the value of the intangible property so to be taxed may be determined substantially as follows: capitalize the net railway operating income of the entire system for the accounting year last ended; assign to Kentucky its mileage proportion of that amount; deduct the assessed value of the tangible property otherwise taxed; and the remainder is the value taken as the basis for the franchise taxes" (274 U. S. 76, 78).

In other words, this Court holds that the franchise value of the 127.63 miles, which the State Court held was in reality the appellant, the Virginia corporation, should under Kentucky Statutes be calculated by using the net income and mileage of the entire *system* of the Virginia corporation. This Court also holds that the system includes lines operated, leased or controlled by the Virginia corporation.

2. "Stipulated facts tended to show that the Virginia company *controlled* the Cincinnati, New Orleans and Texas Pacific" (274 U. S. 76, 79).

Therefore, since the first record in this case showed that the Virginia company *controlled* the Cincinnati, New Orleans and Texas Pacific, the income and mileage of the Cincinnati, New Orleans and Texas Pacific were necessarily included in the calculation of the Virginia company's franchise.

The stipulation (R. 270) filed in the State Court after the reversal by this Court shows that in the calculation used to make up the prior judgment of $1,730,090.02 for 1918, and $3,028,592.62 for 1919, the income, outside values, mileage, and every other pertinent figure of the Cincinnati, New Orleans and Texas Pacific Railway Company was included. Such figures had to be included since the Cincinnati, New Orleans and Texas Pacific was "controlled" by the Virginia corporation.

In other words, on the prior appeal to this Court the fact that the Cincinnati, New Orleans and Texas Pacific Railway Company was *controlled* by the Virginia corporation, and all necessary figures with reference to the Cincinnati, New Orleans and Texas Pacific Railway Company were already in the record. The figures for the Cincinnati, New Orleans and Texas Pacific Railway Company are in the "Additional Stipulation of Facts" filed May 20, 1922 (R. 182) and "as pleaded in said Amended Answer" also filed May 20, 1922 (R. 177).

The Kentucky Court of Appeals and this Court have each held that where a railroad owns a majority of the stock of another company so that it may elect its directors and dictate its policy, it controls the second road within the meaning of the Statute, and that the figures of such "controlled" road must be included in the calculation of the franchise of the owning road.

Commonwealth v. L. & N., 149 Ky. 829-838.

> "If the railroad company owns a majority of the stock of another company so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the Auditor."

The above excerpt from 149 Ky. 829 is copied in full by this Court in the case of Louisville and Nashville Railroad Company v. Greene, 244 U. S. 522-549.

The record on the first appeal to this Court showed the "control" of the Cincinnati, New Orleans and Texas Pacific Railway Company by the Virginia corporation to be an indirect stock ownership control as follows:

Answer to Interrogatory No. 17 (R. ~~31~~ 39 *and R.* ~~72~~ 90*).*

> "Prior to and since January 1, 1917, a corporation called the Southwestern Construction Company owned a majority of the voting stock of the Cincinnati, New Orleans and Texas Pacific Railway Company. The Southern Railway Company owned a certain number of shares of the stock of the Southwestern Construction Company, and the Alabama Great Southern Railroad Company owned a certain number of the shares of the stock of the said Southwestern Construction Company. The Southern Railway Company owned a majority

> of the stock in the Alabama Great Southern Railroad Company. The ownership of the Southern Railway Company and of the Alabama Great Southern Railroad Company in the stock of the Southwestern Construction Company was less than half of said stock. Since January 1, 1917, the amount of stock in the Southwestern Construction Company owned by the Southern Railway Company and the Alabama Great Southern Railroad Company has been more than half of said stock."

In other words, the Virginia corporation does not directly own a controlling interest in the Cincinnati, New Orleans and Texas Pacific Railway Company.

A majority of the stock of the Cincinnati, New Orleans and Texas Pacific Railway Company is owned by a separate corporation, to-wit, the Southwestern Construction Company. The Southern Railway Company does not even own a majority of the stock of the Southwestern Construction Company. However, the Southern Railway Company owns a certain number of shares of the Southwestern Construction Company and the Alabama Great Southern also owns a certain number of shares in the Southwestern Construction Company. The Southern Railway Company owns a majority of the stock of the Alabama Great Southern. The stock of the Southern Railway Company and the stock of the Alabama Great Southern Railroad Company together is a majority of the stock of the Southwestern Construction Company. Therefore, only in this very indirect way can the Southern Railway Company be said to control the Cincinnati, New Orleans and Texas Pacific.

Except for this indirect control for the years 1917 and 1918, there would be, as the Kentucky Court of Appeals held in 204 Ky. 388, no connection between the Kentucky mileage and the rest of the system and consequently no possible basis of a claim for "system" valuation.

We deem it important to emphasize here and to especially call the Court's attention to the fact that when this case was here on the prior appeal—

(a) The record showed the control of the Cincinnati, New Orleans and Texas Pacific Railway Company by the Virginia corporation.

(b) Under the Kentucky Statutes the carrier's system included lines operated, leased or controlled.

(c) The Cincinnati, New Orleans and Texas Pacific Railway Company being a controlled line of the Virginia company, its income, mileage, etc., was necessarily a part of the calculation to determine the value of the Virginia company's franchise.

(d) All figures of income, mileage, etc., for the Cincinnati, New Orleans and Texas Pacific Railway Company were in the record by stipulation.

Clearly, therefore, the fact that the Virginia company controlled the Cincinnati, New Orleans and Texas Pacific Railway Company was an admitted stipulated fact in the prior record. Its figures of income, mileage, etc., were in the record and were actually used in calculating the judgment that this Court reversed.

In the record that came here on the prior appeal, it appeared without contradiction that the Kentucky corporation, which the State Court held was in reality the appellant, the Virginia corporation, and whose franchise value the Court attempted to assess, had an operating history as follows:

1914	Net Loss	$199,032.45
1915	Net Loss	181,624.96
1916	Net Loss	12,459.48
1917	Net Income	112,075.66
1918	Net Loss	605,191.04

or as stated by this Court:

> "The corresponding net income per mile of the Southern Railway Company in Kentucky for 1917 was $878. There was a loss of $4,741 per mile in 1918. The record also shows a loss in each of the years 1914, 1915 and 1916. The average for the five years was a loss of $1,230 per mile per year.
>
> "If considered alone, the railroad of the Southern Railway Company in Kentucky would be a losing venture. Its operating loss was more than $157,000 per year for the average of the five years reported in the record" (274 U. S. 76, 82).

The prior record also showed that the average net income for the entire system of the Virginia corporation, *i. e.*, all lines owned, operated, leased or controlled, including the Cincinnati, New Orleans and Texas Pacific, was—

> "The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918" (274 U. S. 76, 82).

The record further showed that the net railway operating income of the Cincinnati, New Orleans and Texas Pacific Railway Company considered alone was $14,736.92 per mile for 1917, and $9,037.11 per mile for 1918.

It had been stipulated in that record that the Cincinnati, New Orleans and Texas Pacific Railway Company had paid tangible and franchise taxes based on the above earnings.

> "For each year it (the C. N. O. & T. P.) reported to the State Tax Commission in its own name and was so taxed on the basis of the assessment set out in the Amended Answer" (Stipulation, R. 181-183).

Since the record showed the above facts of Southern Railway Company in Kentucky earnings per mile, of system earnings per mile, and of Cincinnati, New Orleans and Texas Pacific earnings per mile, it was obvious that the Cincinnati, New Orleans and Texas Pacific as a separate entity had already paid taxes to the State of Kentucky on values very much larger than the values of the system of the Virginia corporation. As this was true, there could be no claim for any additional taxes on account of the Cincinnati, New Orleans and Texas Pacific Railway Company. The Court, therefore, in its prior opinion made the following statement of fact:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State."

In the above quotation the Court merely made a statement of fact, *i. e.,* that the Cincinnati, New Orleans and Texas Pacific Railway Company as a separate entity had paid taxes on per mile income largely in excess of the per mile income of the system; that therefore the suit was not and could not be a suit for taxes against the Cincinnati, New Orleans and Texas Pacific, but a suit for taxes against the Virginia corporation, which the State Court had held was in fact and in reality the 127.63 miles of the Southern Railway Company in Kentucky.

Immediately following the opinion of this Court (now reported in 274 U. S.), the Commonwealth of Kentucky filed a Petition for Rehearing vigorously calling the attention of this Court to the fact that the Commonwealth did claim taxes growing out of the Cincinnati, New Orleans and Texas Pacific control by the Virginia corporation; that the control of the Cincinnati, New Orleans and Texas Pacific by the Virginia corporation was already in the record; that the figures for the Cincinnati, New Orleans and Texas Pacific Railway Company were already in the record, and that in this suit against the Virginia corporation for franchise taxes, the Cincinnati, New Orleans and Texas Pacific, as a controlled road of the Virginia corporation, was necessarily included in the calculation and before this Court.

The following excerpts from the Petition for Rehearing filed in this Court by appellee are important:

> "* * * This Court in its opinion says '*there was no claim for any taxes in respect to the lines of* the Cincinnati, New Orleans and Texas Pacific.' We submit that in this the Court has mistaken the record. Kentucky did claim taxes growing out of the C. N. O. & T. P. operation and ownership by the Southern system. The facts essential to make out this state of affairs were positively pleaded in an amended answer filed May 20, 1922, Record 139, in which the stock control and physical operating control were set up fully. * * *
>
> "These pleadings and this stipulation of facts have always been treated by all parties to this controversy as entirely sufficient to raise the question whether the facts as stated were sufficient to warrant a basis of unit taxation of the entire system, including the C. N. O. & T. P. for the two years mentioned. * * *
>
> "We submit that the statement in the opinion of this court that there was no claim for any taxes in respect to this line is a serious misstatement of the facts contained in the record. Taxes have always been claimed since these pleadings went into the record and it has always been admitted that if the pleadings and stipulations were sufficient to make out a case then the case was established; they

were put in for the purpose of testing whether the case really existed.

"* * * We are unable to understand the statement in the opinion of this court that there was no claim for taxes on the part of the Commonwealth for the C. N. O. & T. P. mileage, when the facts essential to make out the claim were stipulated to the court by agreement. They are pleaded by one party and admitted by the other and they are contained in the judgment of the court and that judgment was affirmed by the Court of Appeals because this railroad made a physical connection and rendered the system a unit. In fact the thing that distinguishes the first suit from the second is the claim against this railroad as a unifying factor.

* * * * * * * *

"Not only so but the facts were agreed and the case submitted to the court for judgment thereon as to what assessment, if any, against the Southern should be made. If it be true that the reply should have been filed as an amended petition this is immaterial. It was so treated by the circuit court. It was so treated by the Court of Appeals. The objection was not in fact made here in brief or on the oral argument. The C. N. O. & T. P. was the basis of our case and everybody so understood. The case was really tried on the agreed facts."

We have, therefore, the solemn statements of counsel for the Commonwealth of Kentucky that the Commonwealth had always for the years 1918 and 1919 claimed taxes on account of the control of the Cincinnati, New Orleans and Texas Pacific Railway Company by the Virginia corporation; that all of the facts and figures with reference to the Cincinnati, New Orleans and Texas Pacific Railway Company were included in the record on the first appeal to this Court.

The reversal by this Court in 274 U. S. 76 was not on account of any defect in the pleadings. The reversal was because this Court held that to put an additional franchise value of $13,555 per mile for 1918, and $27,730 per mile for 1919, on a line of road that had a net income for the first year of only $878 per mile, and a net loss the next year of $4,741 per mile, was "arbitrarily excessive and included values of system property beyond the limits of Kentucky."

As stated by the Commonwealth in its Petition for Rehearing in this Court, all facts with reference to the Cincinnati, New Orleans and Texas Pacific Railway Company were in the prior record by stipulation. This Court and the Kentucky Court of Appeals have held that a stipulation takes the place of both pleading and proof.

Saltonstall v. Russell, 152 U. S. 628-630.

> "This case having been submitted to the Circuit Court upon a statement of facts agreed by the parties, or case stated, upon which the Court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial; and no finding of facts by the court was necessary. Williard v. Wood, 135 U. S, 309, 314; Bond v. Dustin, 112 U. S. 604, 607."

Lincoln County Bd. of Education v. Bd. of Trustees, 225 Ky. 21-24, 7 S. W. (2d) 499.

> "In addition the point was decided adversely to the contention of appellant in the case of Lodge, *et al.*, v. Williams, *et al.*, 195 Ky. 773, 243 S. W. 1011. In that case it was held that the parties to a suit in a court of general jurisdiction may agree as to the subject matter of their litigation and waive the objection that the issue was not embraced by the pleadings."

Under the authority of these cases and others that might be cited no pleading was necessary as to the Cincinnati, New Orleans and Texas Pacific Railway Company since the facts with reference thereto were, as stated by the Commonwealth in its Petition for Rehearing, stipulated to the Court.

In addition, from the moment the Kentucky Court of Appeals held that the 127.63 miles of Southern Railway Company in Kentucky were in fact and in reality but a division of the Virginia corporation, all figures of every controlled road of the Virginia corporation, which necessarily included the figures of the Cincinnati, New Orleans and Texas Pacific as one of such controlled roads, was in the record and before the Court without the necessity of one word of pleading.

After the reversal by this Court, it was stipulated in the Kentucky Circuit Court (R. 270 to 274) that in the calculation used in arriving at the judgment for 1918—subsequently reversed by this Court—the following figures with reference to the Cincinnati, New Orleans and Texas Pacific Railway Company were used:

Net railway operating income, C. N. O. & T. P.	$4,970,326.01
Total outside excess tangible values, *i. e.,* shops, terminals and double tracks, C. N. O. & T. P.	$1,019,582.15
Entire mileage, C. N. O. & T. P.	337.27
Kentucky mileage, C. N. O. & T. P.	197.50
Values heretofore paid on tangible and intangible property in Kentucky by C. N. O. & T. P.	$9,181,368.00

The stipulation showed corresponding figures for the year 1919.

Because of the most unusual proceedings in the State Court, after the reversal by this Court, we have emphasized the fact that—

(1) the control of the Cincinnati, New Orleans and Texas Pacific Railway Company by the Virginia corporation,
(2) all figures with reference to the Cincinnati, New Orleans and Texas Pacific,
(3) the claim of the Commonwealth for taxes on account of this control of the Cincinnati, New Orleans and Texas Pacific, and
(4) the inclusion of the Cincinnati, New Orleans and Texas Pacific in the actual calculation used in the judgment reversed in 274 U. S. 76,

were each and every one in the record on the prior appeal.

Such facts are shown by:

(a) The opinion of this Court.

(b) The Petition for Rehearing filed by the Commonwealth.
(c) The stipulation in the present record (R. 270) showing the calculations actually used in arriving at the prior judgment.

The case was reversed by this Court and "remanded to the said Court of Appeals for further proceedings not inconsistent with the opinion of this Court" (R. 234). The Kentucky Court of Appeals in turn remanded the case to the State Circuit Court with directions "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States" (R. 235).

Subsequently and on November 2, 1928, the Commonwealth filed an Amended Statement (R. 236). This Amended Statement opens with the allegation that it is—

> "filed for the purpose of making a claim for taxes *against* the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company" (R. 236).

There then follows allegations to the effect that the Virginia corporation *controlled* the Cincinnati, New Orleans and Texas Pacific Railway Company. These allegations were followed by other allegations to which neither the Circuit Court nor the Kentucky Court of Appeals paid any attention, and may therefore be disregarded.

The prayer is in part as follows:

> "WHEREFORE plaintiff prays that this its amended statement be treated as a claim *against* said Cincinnati, New Orleans and Texas Pacific Railway; that the lines and values of said C. N. O. & T. P. be included in the valuations of defendant's property; * * *" (R. 242).

Similar allegations were made as to the year 1919. It will thus be seen that the Commonwealth attempted to make a direct claim *against* the independent and separate railroad corporation known as the Cincinnati, New Orleans and Texas Pacific Railway Company. Since the Southern Railway Company, the Virginia corporation, and the Director General of Railroads were the only parties defendant to the suit, it was clear that there could be no claim against or judgment recovered from the Cincinnati, New Orleans and Texas Pacific Railway Company. Subsequently the Commonwealth filed an additional Amended Statement alleging that the word "against" was in error, and that what they meant to say was that the Amended Statement be treated as a claim against the Virginia corporation and the Director General of Railroads "by reason of" the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company (R. 278).

Therefore, the only pertinent matter in the Amended Statement was the allegation that it was filed for the purpose of making a claim either "against" or "in respect of" the lines of the Cincinnati, New Orleans and Texas Pacific.

On the same date, to-wit, November 2, 1928, answer was filed by the Southern Railway Company, the Virginia corporation, and the Director General of Railroads (R. 243) making appropriate denials and affirmatively alleging that theretofore and on May 20, 1922, a judgment had been rendered in the Circuit Court adjudging that for the taxing year 1918, the value of the franchise of the Virginia corporation omitted from taxation was $1,730,090.02, and for 1919 was $3,028,592.62; that these values were arrived at according to a calculation which is set out in detail; that this judgment was affirmed by the Kentucky Court of Appeals and was afterwards reversed by the Supreme Court in 274 U. S. 76; that to assess taxes against the defendants, or either of them, on the basis of the calculations thus set out in detail—

> "would be a violation of the Constitution of the State of Kentucky, and a violation of the Constitution of the United States, particularly the due process and equal protection clause of the Fourteenth Amendment thereof" (R. 243-261).

The answer further alleges:

> "The effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for the purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be a violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the due process and equal protection

clauses of the Fourteenth Amendment thereof" (R. 243-265).

The answer also pleads the net railway operating income per mile of appellant's system (including the Cincinnati, New Orleans and Texas Pacific) at $3,641.75 per mile for 1918 taxes, and $3,623.81 per mile for 1919 taxes, and that the net railway operating income of the Southern Railway Company in Kentucky is only $878.19 per mile for 1918 taxes and net deficit of $4,742.13 per mile for 1919 taxes.

A reply was filed on the same date (R. 266), and additional stipulations were filed (R. 270). These stipulations set out in detail the method of calculation used in the prior judgment that was reversed (R. 270 to 274), and that this method of calculation was the method universally, systematically and intentionally used by the taxing authorities of the State of Kentucky with regard to franchise tax assessments of all common carriers having lines within and without the State.

It must be remembered that in the prior record it was shown that the Southern Railway Company in Kentucky, the Cincinnati, New Orleans and Texas Pacific Railway Company, and each of the other Kentucky railroads controlled by stock ownership, had paid full tangible and franchise taxes on their separate properties; that the Cincinnati, New Orleans and Texas Pacific Railway Company had paid a franchise tax assessment on earnings in excess of $14,700.00 per mile for 1918 and in excess of $9,000.00 per mile for 1919, whereas the "system" income was less than $4,000 per mile for each of the years.

On the same date, to-wit, November 2, 1928, the Woodford Circuit Court entered a judgment adjudging that the omitted franchise of the Virginia corporation for 1918 was $1,730,090.02, and for 1919 was $3,028,592.62. The figures and method of calculation used by the Court to fix these present valuations are set out in detail in the judgment (R. 278 to 284); and a comparison with the stipulation showing the figures and method of calculation used in the prior judgment (R. 270 to 274) will show that the method, calculations and figures in the present judgment are identical with the method, calculations and figures used in the judgment that was reversed.

An appeal was taken from this judgment to the Kentucky Court of Appeals. The latter Court, in an opinion, dated March 27, 1930, affirmed the judgment of the lower Court (R. 290).

The constitutional question, *i. e.*, that the proposed additional franchise tax was arbitrarily excessive and included values of property and earnings from property located outside of the State of Kentucky, was raised in the original pleadings and in the answer filed after the reversal by this Court. The answer also alleged facts showing that the earnings of the Southern Railway Company in Kentucky were less than the "system" earnings of appellant.

The Kentucky Court of Appeals in its opinion of March 27, 1930 (R. 290), considered each of these constitutional questions and passed on them adversely to appellants.

After the opinion of the Kentucky Court of Appeals, a petition for rehearing was filed in the Court of Appeals (R. 315). This Petition for Rehearing again stressed the constitutional questions. The Petition for Rehearing was overruled without opinion on the 5th day of June, 1931 (R. 355).

The appellants, Southern Railway Company and Director General of Railroads, each filed separate assignments of errors (R. 356; R. 360). Both of the appellants rely upon and urge the following assigned errors:

1. The Kentucky Court of Appeals has not obeyed or carried out the mandate or opinion of this Court reported in 274 U. S. 76 (R. 356, 360).
2. With no new question of law or fact in the record, the State Court has affirmed the same judgment that had been reversed by this Court (R. 356, 360).
3. The State Court erroneously assumed that the prior reversal by this Court was because of the failure of appellee to plead or make claim for taxes in respect of the Cincinnati, New Orleans and Texas Pacific Railroad Company, when such reversal was upon the merits of the case and not upon any failure or defect of pleading (R. 357, 360).
4. The State Court erred in assuming that any special claim or pleading in respect of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company was necessary in order to in-

clude any claim for franchise taxes that appellee might have against the Southern Railway Company and the Director General of Railroads, or either of them (R. 357, 360).

5. The State Court erred in holding that the pleadings, stipulations of the parties and the record on the first appeal to this Court were not sufficient to present all claims of the Commonwealth of Kentucky for franchise taxes against the appellants, or either of them in respect of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company as a part of the system of the Southern Railway Company (R. 357, 361).

6. The State Court erred in holding that Kentucky Statutes, Sections 4077 to 4091, inclusive, and each of them, as construed, interpreted and applied by the Kentucky Court of Appeals in this cause, were not repugnant to the due process clause of the Fourteenth Amendment, and in deciding in favor of the validity of said statutes, and each of them, over such constitutional objections interposed respectively by each of the appellants (R. 357, 361).

7. The State Court erred in holding that the assessments upheld by it for each of the years in controversy for the purpose of franchise assessment and taxation, did not have the effect of bringing into Kentucky for purposes of assessment and taxation property not in Kentucky, and values appertaining to property not in Kentucky, and income derived from property not in Kentucky, each and all of which holdings are contrary to the due process clause of the Fourteenth Amendment as claimed by each of the appellants, and as held by

this Court in its prior opinion of reversal (R. 357, 361).

8. The State Court erred in holding that the adoption of the mileage system of valuation for the Southern Railway System as applied to the assessment for franchise taxes for each of the years involved herein was not void because of the different character and value of the lines outside of Kentucky from the lines in Kentucky, which precluded the application of the per mile method of valuation, each and all of which holdings were contrary to the due process clause of the Fourteenth Amendment as claimed by each of the appellants, and as held by this Court in its prior opinion of reversal (R. 358, 361).

9. The State Court erred in holding that the assessments for franchise taxes and the tax for such purpose for each of the years involved herein was not void because such additional assessment based on mileage outside of Kentucky was so arbitrary and unreasonable in amount as to violate the due process clause of the Fourteenth Amendment as claimed by each of the appellants and as held by this Court in its prior opinion of reversal (R. 358, 362).

10. The State Court erred in distributing the assessment of the franchise value found by the Court to be due for each of the years in controversy from the appellants over the mileage of the Cincinnati, New Orleans and Texas Pacific Railway Company because the franchise sought to be assessed was solely the franchise of the Southern Railway Company and not the franchise of the Cincinnati, New Orleans and Texas Pacific Railway Company, which last named company was not

even a party to this proceeding and because the Cincinnati, New Orleans and Texas Pacific Railway Company had fully paid all of its franchise taxes for each of said years, each and all of which holdings were contrary to the due process clause of the Fourteenth Amendment as claimed by each of the appellants and in conflict with the prior opinion of reversal by this Court (R. 358, 362).

The appellant, Southern Railway Company, further relies upon the following assigned errors:

1. The State Court erred in holding that any assessment for franchise purposes, or any tax levied thereon, or any lien therefor, could be upheld or enforced against the Southern Railway Company, or its property, or that any judgment for taxes could be rendered against the Southern Railway Company for either of the years in controversy inasmuch as it appeared that the property of the Southern Railway Company was, during each of said years, in the possession and under the control and operation of the Director General of Railroads, each and all of which holdings were violative of the due process clause of the Fourteenth Amendment, and laws of the United States with relation to Federal control and operation of railroads, as claimed herein by the appellant, Southern Railway Company (R. 359).

2. The State Court erred in holding that a penalty should be adjudged against the Southern Railway Company on account of failure to list its property for assessment and taxation during each of the years in controversy, the property of the Southern Railway Company during each of said

years being in the possession and under the control and operation of the Director General of Railroads under the proclamation of the President and the Acts of Congress relating to Federal control and operation of railroads, and the Southern Railway Company being under no duty or obligation to return any of its property for assessment for either of said years (R. 359).

The appellant, Director General of Railroads, further relies upon the following assigned error:

1. The State Court erred in holding that any penalty could be assessed against the Director General of Railroads because of any failure on his part to list for assessment for either of the years in controversy any property of the Southern Railway Company, which was in the possession and under the control and operation of the Director General of Railroads during the taxable years in controversy, or that any penalty could be assessed against the Director General of Railroads on account of his failure to pay franchise taxes for either of said years, the assessment of such penalties being in violation of the Proclamation of the President, and the laws of the United States relating to Federal control and the operation of railroads, as claimed herein by the Director General of Railroads (R. 362).

ARGUMENT.

There is, therefore, presented the unusual situation of an appeal from a judgment of the Kentucky Court of Appeals with no new fact in the record which is identical in amount, method of calculation, and every other detail with a judgment of that Court that has been heretofore reversed by the Supreme Court.

The opinion of the Kentucky Court of Appeals (R. 290) is quite long. However, the Court gives two reasons for affirming the judgment and reversing the decision of this Court. The first of these reasons is as follows:

> "It is the contention of counsel for the Southern Railway Company that the opinion of the Supreme Court was based upon exactly the same facts that now appear of record. In view of what has been said in this opinion we cannot agree with that contention. In the amended petition which was filed making claim for taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company a new question was presented. It cannot be said now that there is not any claim for taxes by reason of the control of the Cincinnati, New Orleans and Texas Pacific Railway Company" (R. 290-310; 238 Ky. 638-657).

Stated in another way, the Kentucky Court of Appeals holds that the mere allegation in an amended statement that it is—

> "filed for the purpose of making a claim for taxes by reason of the lines of the Cincinnati, New Orleans and Texas Pacific" (R. 236-238),

presents a new question.

We have shown above:

1. By the opinion of this Court that the stipulations then presented to this Court showed that the Virginia corporation *controlled* the Cincinnati, New Orleans and Texas Pacific, and that the franchise tax was assessed by using income and *mileage of all* operated, leased or controlled roads.
2. That all facts and figures with reference to the Cincinnati, New Orleans and Texas Pacific Railway Company were in the first record by stipulation and that a stipulation takes the place of both pleading and proof.
3. That the Commonwealth in its Petition for Rehearing in this Court correctly stated that it had during all of the time been making claim for taxes on account of the Virginia corporation's *control* through stock ownership of the Cincinnati, New Orleans and Texas Pacific, and that all facts and figures with reference to the Cincinnati, New Orleans and Texas Pacific Railway Company were in the record by stipulation.
4. That by the Kentucky Statutes as interpreted by this Court and by the Kentucky Court of Appeals in cases of common carriers extending within and without the limits of Kentucky, figures of all controlled roads are a necessary part of the calculation in fixing a franchise valuation. The Virginia corporation controlled a very large number of railroads, and in order to include the figures of such controlled roads, it was not necessary that any special allegation

or pleading be filed concerning each of such controlled roads.

5. It is shown by the stipulation (R. 270 to 274) that all figures with reference to the Cincinnati, New Orleans and Texas Pacific Railway Company were used in the calculation by which the valuation in the reversed judgment was fixed.

   In other words, the allegation in the amended statement that the appellant, Virginia corporation, *controlled* the Cincinnati, New Orleans and Texas Pacific Railway Company is not a new fact in the record, and it was no more necessary for the Commonwealth to file a pleading "claiming taxes in respect of" the controlled Cincinnati, New Orleans and Texas Pacific, than for it to file other amendments "making claims for taxes in respect of" the other nineteen roads which the Virginia corporation controlled in 1917 (R. 87), or the twenty-two roads which it controlled in 1918 (R. 71).

6. It was shown by stipulation that during the years in controversy the taxing authorities of Kentucky in fixing the value of the franchise of a common carrier had uniformly, systematically and intentionally included all figures of all controlled roads (Stipulation 5; R. 275), and by further stipulation it was shown that all figures with reference to the Cincinnati, New Orleans and Texas Pacific were actually included in the judgment that was reversed by this Court (Stipulation 3; R. 270 to 274).

We are unable, therefore, to reconcile the above facts with the statement of the Kentucky Court of Appeals in its last opinion that the amended petition presented a new question. Also, in view of all of the above which appears of record, we do not deem it necessary to further argue the point that the amended statement did not present any new question that was not already in the case when it was reversed by this Court.

The other reason given by the Court of Appeals for affirming a judgment imposing taxes on values and property outside of Kentucky, and from earnings on property outside of Kentucky, is because the Kentucky Court said that after deducting excess tangible values, it has always been considered that mileage within and mileage without the State was of equal value.

> "Some of the larger systems of railways operating in Kentucky, own, lease, operate or control mileage that does not yield a large income, but, after eliminating the excess values outside of Kentucky, this mileage has been considered of equal value mile for mile with the other mileage of the system. To allow the Southern Railway Company to escape these additional assessments is to allow it to escape the payment to the State and counties affected of taxes undoubtedly just *if the assessments of railroad properties in Kentucky for the last thirteen years have been correctly made.* * * *"
> (R. 290-312; 238 Ky. 638-659).

When the appellant shows, as has been done in this case, that the 127[illegible]63 miles had a net income for 1917 of only $878 per mile, and a net loss in 1918 of $4,741 per mile, and when a judgment assessing an additional valuation of $13,555 per mile for 1918, and of $23,730 per mile for 1919, we submit that it is no answer to the unconstitutionality of such an assessment for the Court of Appeals of Kentucky to say that the Kentucky mileage "has been considered of equal value mile for mile with the other mileage of the system."

And yet that is the sum and substance of the Kentucky Court of Appeals' opinion in sustaining the unconstitutional assessment—that heretofore Kentucky mileage has always been considered of equal value with outside mileage.

In addition, it is alleged in the answer of the defendants, filed on November 2, 1928, and not denied, that the net railway operating income of the Virginia corporation, and of all owned, operated, leased and controlled lines was $3,641.75 per mile for 1917, and $3,623.81 per mile for 1918, whereas the net railway operating income of the Southern Railway Company in Kentucky—the line which the Court held was but a division of the Virginia corporation, and the line whose franchise value is being assessed was only $878.19 per mile for 1917, and a net deficit of $4,742.13 per mile for 1918.

We do not deem it necessary to reargue points in our original brief and sustained by this Court in its prior opinion that the imposition of such a tax is unconstitutional as bringing into Kentucky for taxation property and earnings derived from property clearly beyond the jurisdiction of Kentucky. The opinion of this Court in this identical case is sufficient (274 U. S. 76).

In the dissenting opinion it was stated the merits of the case were not considered because of a point of practice which was urged by the Commonwealth. Such point of practice cannot now be raised because an amended answer (R. 243) filed in the State Court, following this Court's reversal, clearly raised the constitutional question and in argument, and in brief, and in the Petition for Rehearing (R. 315), each constitutional question was fully argued and brought to the attention of the Kentucky Court of Appeals, and each constitutional question decided adversely to appellants.

To our knowledge, this case is without parallel, *i. e.*, the affirmance by a State Court of the exact judgment that had been reversed by this Court with no new fact appearing in the record.

The opinion of the Court of Appeals erroneously states that:

> "It was the duty of the Southern Railway Company to make a report giving its total mileage of all roads owned, operated, leased or controlled, and the net income for such roads. It failed to do that and allowed two controlled roads mentioned to make separate reports. If the Southern Railway Company had made the reports required by the statute * * *. This was brought about by the failure of the Southern Railway Company to comply with the law" (R. 290-311; 238 Ky. 638-659).

As a matter of fact, it is stipulated in the record that during the years in question the railroad property of the Southern Railway Company was taken over by the Government of the United States. The railroad companies had nothing whatever to do with their property and had no figures from which the various tax reports could be made. All reports were made by the Director General of Railroads and not by the railroad corporations.

The opinon of the Court of Appeals is further erroneous in three particulars:

(1) The alleged increase is spread over the mileage of the Cincinnati, New Orleans and Texas Pacific Railway Company.

(2) The judgment is against both the defendant corporation and the Director General of Railroads.

(3) The judgment attempts to impose a penalty against the Director General of Railroads.

These will be discussed in the order named:

1. THE ALLEGED INCREASE IS SPREAD OVER THE MILEAGE OF THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

It must be remembered that this suit is against the Virginia corporation; that it is against the Virginia corporation only because the Kentucky Court of Appeals held that the 127.63 miles of road belonging to the Kentucky corporation was in fact the Virginia corporation, and that franchise taxes should be assessed as though the mileage of the Southern Railway Company in Kentucky were but a division of the Virginia corporation. In other words, since the Southern Railway Company in Kentucky as a separate corporate entity has paid its own franchise tax, the sole purpose of the suit is to ascertain and fix the added value, if any, that belongs to its 127.63 miles, because the Court of Appeals has said that it was but a division of the Virginia corporation instead of a separate corporate entity.

There is no attempt here to collect any additional tax from or against the separate Cincinnati, New Orleans and Texas Pacific Railway Company. It is error, therefore, to spread any alleged increase in franchise value over the lines of that road. The Cincinnati, New Orleans and Texas Pacific Railway Company has paid its own franchise tax based on earnings more than three times as large as the earnings of the entire system of appellant, including the earnings of the Cincinnati, New Orleans and Texas Pacific Railway Company as a part of such system.

This same error on the part of the Court of Appeals of Kentucky was condemned by this Court in the prior opinon.

2. THE JUDGMENT IS AGAINST BOTH THE DEFENDANT CORPORATION AND THE DIRECTOR GENERAL OF RAILROADS.

The tax in question is a property tax, *i. e.*, a tax on the intangible property of a corporation.

Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499.
Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 166 U. S. 150.

The Director General of Railroads took possession on December 28, 1917, as of December 31, 1917, under a proclamation of the President. An Act was subsequently passed and approved on March 21, 1918, confirming the conduct of this Federal Administration of Railroads (U. S. Comp. Stats. Anno. Supp. 1919-1923, Sec. 3115¾, *et seq.*, 40 Stat. at Large, 457).

This Act specifically provided that all taxes assessed against the property of the railroads during Federal control should be paid by the Government. Section 1 of the Acts provides as follows:

> "Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto, or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway opera-

tions while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation."

Section 15 of the Act provides as follows:

> "That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulation of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

These taxes, therefore, being property taxes are not the liabilities of the railroad corporation. The General and Special Demurrers of the Railway Company should be sustained.

This Court and the Kentucky Court of Appeals have frequently held that the Director General alone was responsible during Federal control, and that the above Federal control act was supreme even where it conflicted with the State law.

Davis, Director General, v. Dantzler Lbr. Co., 261 U. S. 280.
North Carolina R. Co. v. Lee's Adm'x, 260 U. S. 16.

3. THE JUDGMENT ATTEMPTS TO IMPOSE A PENALTY AGAINST THE DIRECTOR GENERAL OF RAILROADS.

That the twenty per cent (20%) added in the judgment is a penalty appears from the statute itself—4241 Kentucky Statutes. Thus it is said in this statute:

> "All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof."

The Kentucky Court of Appeals in its last opinion distinctly calls the twenty per cent a penalty but justified it by saying that the element of punishment does not predominate.

> "* * * The penalty assessed under the Statutes of Kentucky against delinquent taxpayers is not one where the element of punishment predominates. The circuit court was not in error in allowing the penalty" (R. 290-314; 238 Ky. 638-662).

This Court had held that the Director General was not liable for a penalty.

Missouri Pacific R. Co. v. Ault, 256 U. S. 554.

In this case it appears that a statute of Arkansas provided that whenever a railroad company discharged an employe, with or without cause, the railroad company should pay the discharged employe the wages due him within seven days of the discharge. Further, that if payment was not made within the above time, "then as a penalty for such non-payment the wages of such servant or employe shall continue from the date of the discharge or refusal to further employ at the same rate until paid." In August, 1918, Ault brought suit against the Railroad Company, alleging that he had been employed by the Company at the rate of $2.50 per day; that he had been discharged on July 29, 1918, and that $50.00 was then due him as wages but had not been paid. He recovered judgment by default. The Company appealed to the Circuit Court of the State and there moved in January of 1919 to substitute as the defendant the Director General of Railroads. The Court refused to make this substitution, but joined the Director General as a party defendant and rendered judgment against both the Director General and the Railroad Company upon a verdict that Ault recover the sum of $50.00 due him as wages and $390.00 as penalty. The judgment was affirmed by the Supreme Court of Arkansas.

On appeal to the Supreme Court that Court held:

> "Whatever name be applied, the element of punishment clearly predominates and Congress has not given its consent that suits of this character be brought against the United States. The judgment against the Director General, so far as it provided for recovery of the penalty, was erroneous."

The question was again before this Court in the case of *Norfolk-Southern R. R. Co.* v. *Owens,* 256 U. S. 565. The opinion is very short, and is as follows:

> "This case comes here on writ of certiorari (251 U. S. 550) to the Supreme Court of North Carolina, which affirmed (178 N. Car. 325) a judgment of $21.00 against the Norfolk-Southern Rail-

road Company in favor of Owens, a shipper. The amount was assessed under a statute of the State as a penalty for undue delay in making delivery of an intrastate shipment made March 27, 1918. At that time the railroad was in the possession and control of the Government, and was being operated by the Director General under the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451. The only question presented for decision is whether the company was liable for the penalty. We are of opinion that it was not, for the reasons stated in Missouri Pacific R. R. Co. v. Ault, decided this day, *ante*, 554."

We submit that the judgment of the Kentucky Court of Appeals should be reversed because:

1. It is a duplicate of the judgment heretofore reversed by this Court.
2. It is an attempt to tax property and earnings from property outside of the State of Kentucky contrary to the Fourteenth Amendment.
3. The property being in the control of the Federal Government no judgment could be entered against the Railroad corporation.
4. No penalty could be assessed against the Director General.

WHEREFORE, we ask that the judgment of the State Court be reversed.

Respectfully submitted,

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APPENDIX.

PRIOR OPINION OF SUPREME COURT OF THE UNITED STATES.

274 U. S. 76.

Method and Figures Used in Calculating Assessment of Judgment that was Reversed

AND

Method and Figures Used in Calculating Assessment of Present Judgment.

Supreme Court of the United States

Nos. 33 and 34.—October Term, 1926.

Southern Railway Company, Plaintiff in Error, 33 *vs.* Commonwealth of Kentucky. James C. Davis, Director General, Plaintiff in Error, 34 *vs.* Commonwealth of Kentucky.	In Error to the Court of Appeals of the State of Kentucky.

[April 11, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

A judgment against plaintiffs in error for franchise taxes imposed under the laws of Kentucky in respect of certain lines of railway was affirmed by the highest court of that State. 204 Ky. 388. And see 193 Ky. 474. Reversal is sought on the ground that as applies these laws contravene the due process clause of the Fourteenth Amendment.

The statutes* (§§4077-4081) provide that every foreign or domestic railway company, in addition to other taxes imposed by law, shall pay an annual tax on its franchise. The provisions apply whether the privilege is exercised by the corporation in its own name or in the name of another which it adopts. A company's railway system is deemed to include lines operated, leased or controlled whether technically owned or not. The tax is on intangible property. Where the railroad is partly within and partly without the State, the value of the intangible property so to be taxed may be determined substantially as follows: capitalize the net railway operating income of the entire system for the accounting year last ended; assign to Kentucky its mileage proportion of that amount; deduct the assessed value of the tangible property otherwise taxed; and the remainder is the value taken as the basis for the franchise taxes. When the railroad is wholly within the State, the capitalized net, less the assessed value of tangible property on which other taxes are paid, is taken to be the value of intangible property. *Greene* v. *Louis. & Interurban R. R. Co.,* 244 U. S. 499, 510, and cases cited; *Louis. & Nash. R. R. Co.* v. *Greene,* 244 U. S. 522, 539.

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*The provisions are printed in the margin of Louis. & Nash. R. R. Co. v. Greene, 244 U. S. 522, at page 533.

Plaintiff in error, the Southern Railway Company, is a Virginia corporation. The lines of its system of railroads, exclusive of the Kentucky mileage in question, exceed 9,500 miles and extend from Washington, D. C., into Virginia, the Carolinas, Tennessee, Georgia, Florida, Alabama and Mississippi. The company also has a line from New Albany, Indiana, to East St. Louis, Illinois. It does not own any railroad in Kentucky. The "Southern Railway Company in Kentucky" owns 127.63 miles, all of which are in that State. Its branches connect with the line of the Cincinnati, New Orleans and Texas Pacific Railway Company which extends from Cincinnati to Chattanooga and connects it with the system. Its stock is owned by the Virginia company. The same persons are officers of both. The lines of the Kentucky company are reported to public authorities and are advertised as a part of the system. The Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company own, in all, about 53.3 miles of railroad in Kentucky, but their lines are not connected with the lines of the Southern Railway Company in Kentucky. The Virginia company through stock ownership controls these companies; but they and the Southern Railway in Kentucky, in their own names and as owners, made reports and paid in full all taxes assessed under Kentucky laws on their tangible and intangible properties.

The Commonwealth brought this suit against the Virginia company and the Director General to recover additional franchise or intangible property taxes for 1918 and 1919 in respect of the Kentucky mileage of these companies. The Court of Appeals held that there was no such connection or unity of use between the system of the Virginia company and the lines of the Mobile and Ohio, the Cumberland Railroad and the Cumberland Railway as would justify recovery of any franchise taxes in respect of their Kentucky mileage. Stipulated facts tended to show that the Virginia company controlled the Cincinnati, New Orleans and Texas Pacific; and the court held that by means of its lines the railroad of the Southern Railway in Kentucky was so connected with the lines of the Virginia company as to be a part of the system. The value of intangible property adjudged to have been omitted, and on which the additional franchise taxes were calculated, for 1918 was $1,730,090.02 and for 1919 was $3,028,592.62. These amounts were arrived at as follows: the net railway operating income for the entire system was capitalized at seven per cent; there was deducted an amount to cover the value of shops, terminals and double tracks outside Kentucky in excess of corresponding tangible property connected with the lines in that State; there was allocated to Kentucky such proportion of the remainder as 424.61 miles, which were attributed to Kentucky, bore to the total mileage of the system; that amount was equalized for taxation at 75 per cent. for 1918 and at 85 per cent. for 1919; and from the result there was deducted the values of tangible and intangible property (including the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific) on which taxes had been paid. But the average value per mile so deducted was less than the system average per mile. The amounts so arrived at were assigned to the 127.63 miles of the Southern Railway Company in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans and Texas Pacific. The increase per mile for 1918 was $5,334.55 and for 1919 was $9,338.34.

The Court of Appeals rightly declared that a State may tax property permanently within its jurisdiction belonging to one domiciled elsewhere and used to carry on commerce among the States; that, where property is a part of a system and has its actual use only in connection with other parts of the system, that fact may be considered even though other parts of the system are outside the State; that the State may not tax property outside its jurisdiction belonging to one domiciled elsewhere, and that the mileage basis of apportionment cannot be adopted in the taxation of railroad franchises where the result is shown to be arbitrarily excessive. These propositions are derived from the decisions of this Court. *Fargo* v. *Hart*, 193 U. S. 490, 499; *Pittsburgh, &c. Railway Co.* v. *Backus*, 154 U. S. 421, 427-431; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282; *Wallace* v. *Hines*, 253 U. S. 66, 69.

The question is whether the State made valid application of the governing principles. The value of tangible property is not involved in this case. The demand of the Commonwealth against the plaintiffs in error was for taxes on intangible properties over and above the amounts that had been paid by the owning companies. And the entire amount added as a basis for additional taxes is attributable only to the lines of the Southern Railway Company in Kentucky. There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto. The Mobile and Ohio, the Cumberland Railroad and the Cumberland Railway were held not to be a part of the system. Plaintiffs in error insist that the enforcement of the taxes on these amounts, as measuring the additional values of intangible properties inhering in the lines of the Southern Railway Company in Kentucky, operates to tax the property of the Virginia company located beyond the borders of Kentucky and that such amounts are arbitrarily excessive.

The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation. *Smyth* v. *Ames*, 169 U. S. 466, 547. Much weight is to be given to present and prospective earning capacity at rates that are reasonable having regard to traffic available and competitive and other conditions prevailing in the territory served. No intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called. See *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202.

The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway Company in Kentucky of $13,555 per mile for 1918 and of $23,730 for 1919. The 1917 average net operating income per mile for the system was the basis for determining the Kentucky franchise taxes for 1918, and the average for 1918 controlled the amount of the 1919 taxes. The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918. The corresponding net income per mile of the Southern Railway Company in Kentucky for 1917 was $878. There was a loss of $4,741 per mile in 1918. The record also shows a loss in each of the years 1914, 1915 and 1916.

The average for the five years was a loss of $1,230 per mile per year.

If considered alone, the railroad of the Southern Railway Company in Kentucky would be a losing venture. Its operating loss was more than $157,000 per year for the average of the five years reported in the record. But, assuming it a part of the system, it is right to take into consideration the parts outside the State that are operated in connection with it. The mileage used as an integral part of a railroad system may have elements of value that it otherwise would not possess, and the State properly may have regard to the whole in order to ascertain the value of the part that is within its borders. *Fargo* v. *Hart, supra,* 499. But, if the method pursued in valuing property within the State is arbitrary and the resulting valuation is grossly excessive, the tax must be condemned as in contravention of the due process clause of the Fourteenth Amendment. *Union Tank Line* v. *Wright, supra,* 282, and cases cited. It is not permissible for the State to take into account any of the outside property "unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State." *Wallace* v. *Hines, supra,* 69.

The operating results of the system compared with those of the Southern Railway Company in Kentucky show that, on the basis of valuation adopted by the State, the average value per mile of the lines of that company is very much less than the average value per mile of the system. If taken separately it is clear that, because of lack of net earnings, no substantial intangible elements of value could reasonably be attributed to the railroad of that company. In order to justify the increases made, there would have to be attributed to these lines large amounts from system earnings. To sustain the addition for 1919, it is necessary to take enough to overcome the deficit of $4,741 per mile plus a fair return on the value of the physical property and on the $23,730 per mile fixed as a basis for additional taxes.

The draft on earnings from other parts of the system to sustain the increase for 1918 would not be so heavy. But it is equally obvious that there is no foundation for the finding that there existed in these lines intangible values of $1,730,090 or any other substantial amount in excess of the value fairly to be attributed to the physical elements of the railroad. If intangible elements were attributed to the system at the same rate per mile as results from the distribution of the added amount to the mileage of the Southern Railway in Kentucky, their value would be more than $200,000,000 for 1919 and more than $120,000,000 for 1918. Clearly there is no foundation for any such results. The mere statement of the figures is sufficient to show that the amount added as a basis for franchise taxes is so excessive and unreasonable that it cannot be sustained; and such an application of the system earnings amounts to an attempt to tax property outside the State. And as the direct earnings per mile of the lines of that company are so much less than the average for the system, it is plain that the amount adjudged to have been omitted was arbitrarily excessive and included values of system property beyond the limits of Kentucky.

Moreover, the percentages used to make the apportionment to Kentucky were too high. Reference to the figures for 1919 will be sufficient. There was taken 4.273 per cent of $432,326,444.12, the system value to be apportioned. The system mileage was 9939.1, and that used for the apportionment was 424.61. The Southern Railway Company in Kentucky had 127.63 miles, the Cincinnati, New Orleans and Texas Pacific, 197.5, the Mobile and Ohio, 38.693, the Cumberland Railroad, 12.9, and the Cumberland Railway, 1.74. As the court held that the lines of the three companies last mentioned were not so connected with the system that plaintiffs in error were liable in respect of them, their mileage was erroneously included in the factor used for apportionment to the lines taxed. And for the reasons stated the mileage of the Cincinnati, New Orleans and Texas Pacific should not have been included. The mileage used to make the apportionment was more than three times that of the Southern Railway in Kentucky, and was more than thirty per cent. in excess of the combined mileage of that company and the Cincinnati, New Orleans and Texas Pacific. Obviously deduction of the lesser value of the Kentucky mileage on which the owners had paid taxes did not eliminate the error.

The enforcement of the franchise taxes so assessed would violate the due process clause of the Fourteenth Amendment.

The Commonwealth asserts that in the Kentucky courts the company did not make "the objection which is made here that this was a tax on property outside the State." But the record shows the contrary. The petition alleged that a portion of the Kentucky franchise had been omitted from assessment and prayed that such portion be assessed and taxed. The answer of plaintiffs in error not only denied liability and alleged that to hold the company liable and to attempt to add to that assessment would be a violation of the Fourteenth Amendment, but it also stated: "Defendants say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be a violation of . . . the Constitution of the United States, particularly the Fourteenth Amendment thereof." In its first decision (193 Ky. 474), the Court of Appeals said (p. 488): "It is our conclusion, therefore, that the court should have assessed against defendant [Southern Railway Company of Virginia] Kentucky's portion of the intangible property assessed by the proportion of the mileage that the lines nominally operated by the 'Southern Railway Company in Kentucky' bear to the entire mileage of defendant's system estimated according to the method provided by the statute. But it is insisted that this would result in taxing in Kentucky property having no situs here. . . ." Then follows the court's answer to that contention. This shows that the court distinctly recognized and passed upon the contention that the imposition of the additional franchise taxes would be to tax property outside Kentucky. That decision, according to the local rule, not only bound the lower court, but controlled the disposition of the case on the second appeal. *Hopkins* v. *Adam Roth Grocery Co.*, 105 Ky. 357, 358. The objections were reiterated in an amended answer filed after the first decision. And the Court of Appeals in its second decision declared that the additional assessments "were made in accordance with and are concluded by the former opinion herein." Clearly, the objections made in the state courts were sufficient. They went to the point that, as proposed to be applied and enforced, the state statutes would operate to tax property outside and beyond the jurisdiction of Kentucky in contravention of the Fourteenth Amendment. And, notwithstanding these objections, the Court of Appeals in its first decision directed the making of these additional assessments; and, in its second decision, declared that they had been made as directed and affirmed the judgment of the Circuit Court by which they were determined.

A petition for certiorari was filed, but, as the case is properly here on writ of error, the petition will be denied.

Judgment reversed on writ of error.
Petition for certiorari denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Supreme Court of the United States

Nos. 33 and 34.—October Term, 1926.

Southern Ry. Co., Plaintiff in Error,
33 *vs.*
Commonwealth of Kentucky.

Andrew W. Mellon, Director General,
34 *vs.*
Commonwealth of Kentucky.

In Error to the Court of Appeals of Kentucky.

[April 11, 1927.]

Mr. Justice Brandeis, dissenting.

I do not consider the merits of this case, because, in my opinion, it should be affirmed on a point of practice which was urged here by the Commonwealth. On writ of error to a state court, even where, as here, this Court has jurisdiction, no objection is reviewable which was not made there. The question on which the judgment of the Court of Appeals of Kentucky is reversed was not raised or passed upon below.

The claim made below was that the Southern could not be taxed at all in Kentucky under the unit rule and that, therefore, the statute as applied was void. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 288-290. The Commonwealth admitted that the Southern, a Virginia corporation, did not [illegible] the Kentucky lines directly. The Southern admitted that it controlled them by stock ownership. In support of the claim that the unit rule could not be applied, the Southern made two contentions. The first was dealt with by the Court of Appeals in its first opinion, 193 Ky. 474; the second, in its second opinion, 204 Ky. 388. The first contention was that the unit rule could have no application, because the Southern was not doing business in Kentucky. That contention the Court of Appeals decided against the Southern for all the years; and this Court affirms the ruling. The second contention was that the unit rule did not apply, because there was not unity of use and operation of the Kentucky lines with its lines elsewhere. The question depended upon the amount of control exercised by the Southern Railway Company over the C., N. O. & T. P. Railway, which connected the Southern Railway in Kentucky with the rest of the Southern system. This contention the Court of Appeals decided in favor of the Southern for the years 1914, 1915 and 1916; but against it for the years 1917 and 1918. With this ruling also this Court agrees. The reversal by this Court is based on an entirely different claim. It is on the ground that the method of assessment used was such as to furnish, as a basis for the franchise tax, an amount so unreasonable and arbitrary as to involve taxation of property outside the State, in view (1) of the fact that the per mile earnings of the entire system were so much larger than the per mile earnings of the Southern in Kentucky, and (2) of the supposed use of too large a percentage intended to represent the proportion of the mileage in Kentucky to the total mileage of the system.

The Court of Appeals recognized clearly that it could not tax in Kentucky any property outside its limits. It upheld the tax as an increase of assessment upon property located confessedly in Kentucky, applying the rule of *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338, that "if the property be part of a system and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system.''

Applying the unit rule, however, there are two grounds on which a decision sustaining the claim that property outside the State has been taxed might have rested, if the appropriate claim had been made below. It might have been held that the statute, so far as it required the adoption of the mileage plan of valuation, was void as applied, because the different character of the lines outside Kentucky precluded the application of the per mile method as a basis of valuation. Compare *Fargo* v. *Hart,* 193 U. S. 490; *Wallace* v. *Hines,* 253 U. S. 66, 69. Or it might have been held that the tax was void, because the additional assessment based on mileage without the State was so arbitrary and unreasonable in amount as to violate due process. Compare *Union Tank Line Co.* v. *Wright,* 249 U. S. 275; Wal*lace* v. *Hines,* 253 U. S. 66, 69-70. But neither of these claims was made in the court below. The only contentions made there were those which this Court and the lower court agree in holding unfounded—namely, that the Southern was not doing business in Kentucky and that there was no such unity of use and operation of the lines within and those without the State as to permit of the application of the unit rule.[1]

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[1] The reason urged by the Southern in support of the second contention was, as the second opinion recites, that the Kentucky lines ''had neither physical nor operative connection with lines outside of the state . . . and that to apply the notion of organic unity to all its lines under such circumstances is violative of the Fourteenth Amendment of the Constitution of the United States, in that it brings into Kentucky for taxation purposes values wholly outside the state. Whether or not this is true is the sole question presented for decision upon these appeals.'' The Court of Appeals decided the second contention in favor of the Southern for the years 1914, 1915 and 1916, because it concluded ''that there was in fact no physical connection between the Northern branch and the Southern branch of the defendant's lines, and that despite the defendant's ownership and control of both of these separate branches, they cannot, under the many decisions of the Supreme Court of the United States, be considered as parts of a single system for the purpose of ascertaining the value of defendant's franchise employed in Kentucky without violating the Fourteenth Amendment of the federal Constitution.'' It held the Southern taxable for the years 1917 and 1918 because in 1917 the ''defendant acquired the C. N. O. & T. P. Ry. Co.,

The second opinion of the Kentucky Court of Appeals recites that "it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by our former opinion." Hence it was necessary for the plaintiff-in-error to show that the objections insisted upon in this Court were raised upon the first trial or the appeal in the state court.[2] A consideration of the entire answer and of the entire first opinion make it altogether clear that the contention, which was advanced by the answer and refuted by the opinion, consisted solely of the claim that any assessment against the Southern would be unconstitutional as taxing property outside the State because the Southern was not doing business within the State. Neither the record nor the opinion of the Court of Appeals discloses that there was an objection to the assessment as such. Nowhere in the opinion is there any reference to the figures urged here as showing the arbitrariness of the statute as applied.

It cannot be said "that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." *Dewey* v. *Des Moines*, 173 U. S. 193, 200. The rule that a claim or right which was not asserted in the state court cannot be deemed to have been denied, and hence cannot be insisted upon in this Court has been long

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and thus unified all of its holdings into a single unit of use and management." In considering the situation for the earlier years it stated: "The question for decision then finally narrows to whether for the purpose of valuing defendant's franchise employed in Kentucky, the line from Danville, Kentucky, to St. Louis, Mo., is to be considered as a separate unit or as a part of a system including also defendant's eastern and southern lines."

[2] As showing that they were raised, this Court relies upon the allegation of the answer that "the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky; . . . that to do this would be in violation of . . . the Fourteenth Amendment," and upon a quotation from the first opinion of the Kentucky Court of Appeals to the effect that "it is insisted that this would result in taxing in Kentucky property having no situs here. . . ." The reliance of this Court appears to rest upon a misapprehension. On the first trial, the lower courts dismissed the State's petition. As no method of assessment was before the Court of Appeals, it could not, in its first opinion, have passed upon the arbitrariness of this or any other method of assessment. See 193 Ky. 474, 489.

established.[3] It is true also that the party defeated upon a federal question in a state court will not be limited in this Court to the same arguments upon that question, *Dewey* v. *Des Moines, supra,* at p. 198; and that, if the federal question is properly raised, it is immaterial that the state court may have refused to discuss the point. *Erie R. R. Co.* v. *Purdy,* 185 U. S. 148, 154. But if the contention made below differs from the contention made here to such a degree that the decision upon one would not necessarily conclude the other, the raising of one below will not permit the raising of the other here, even if the same provision of the Constitution be the basis of both claims. Compare *Dewey* v. *Des Moines, supra*; *Marvin* v. *Trout,* 199 U. S. 212, 223-224, 227.

The importance of the rule of practice is illustrated by the case at bar.[4] Because the reasonableness of the method of assessment was not questioned below, there is nothing in the record to show what figures and what method of calculation were used by the taxing officers. The figures adopted by this Court are presented only in the brief of the plaintiff in error. They are protested by counsel for the Commonwealth. Moreover, there is reason to believe that the inferences drawn from them are unsound.

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[3] In 1836 Mr. Justice Story, because of the fact “that a different impression exists at the bar,” reviewed all the cases that had reached this Court from the state courts, finding that they exhibited “an uniformity of interpretation . . . which has never been broken in upon,” requiring that, in order to give the Court jurisdiction, the question sought to be reviewed had both to be raised in the court below and there decided. Crowell v. Randell, 10 Pet. 368, 392, 398. By 1894 Chief Justice Fuller regarded such principles as “axiomatic.” California Powder Works v. Davis, 151 U. S. 389, 393. The rule is still inflexible. New York v. Kleinert, 268 U. S. 646.

[4] Compare Hamilton Co. v. Massachusetts, 6 Wall. 632, 636; National Bank v. Commonwealth, 9 Wall. 353, 363; Edwards v. Elliott, 21 Wall. 532, 557; Wilson v. McNamee, 102 U. S. 572; Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 633; Bolln v. Nebraska, 176 U. S. 83, 90; Chapin v. Fye, 179 U. S. 127; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248; Cox v. Texas, 202 U. S. 446, 452; Montana v. Rice, 204 U. S. 291, 301; Hunter v. Pittsburg, 207 U. S. 161, 180; Selover, Bates & Co. v. Walsh, 226 U. S. 112; Illinois Central R. R. Co. v. Mulberry Coal Co., 238 U. S. 275, 281; Bullen v. Wisconsin, 240 U. S. 625, 632; Hiawassee River P. Co. v. Power Co., 252 U. S. 341. Compare Virginian Ry. Co. v. Mullens, 271 U. S. 220.

FIGURES, METHOD AND CALCULATION USED IN MAKING ASSESSMENT THAT WAS REVERSED IN 274 U. S. 76 (R. ——). 271-274

YEAR ENDED JUNE 30, 1917, ON WHICH TAXES FOR THE YEAR 1918 WERE BASED.

Net railway operating income, Sou. Ry. Co., Va., and owned, operated, leased and controlled roads		$ 31,806,408.49
Net railway operating income, C. N. O. & T. P		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
DEDUCT: "Total outside excess tangible values, *i. e.*, shops, terminals and double tracks, of Sou. Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
Total outside excess tangible values, *i. e.*, shops, terminals and double tracks, C. N. O. & T. P	1,019,582.15	
		$68,851,913.86
DEDUCT total tangible outside value, we have		$456,530,007.57
Entire mileage Sou. Ry. Co., Va., and owned, operated, leased and controlled roads	9,761.36	
Entire mileage, C. N. O. & T. P	337.27	
	10,098.63	
Ky. mileage, Sou. Ry. Co., Ky., M. & O., Cumberland R. R., and Cumberland Ry	227.14	
Ky. mileage C. N. O. & T. P	197.50	
	424.64	
Proportion Ky. to total mileage 4.209%—4.209% of $456,530,007.57 gives total value in Ky		$19,215,348.02
Equalized at 75%		$14,411,511.02
Values heretofore paid on tangible and intangible property in Ky., by Sou. Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry	$3,500,053.00	
Values heretofore paid on tangible and intangible property in Ky., by C. N. O. & T. P	9,181,368.00	
		$12,681,421.00
Omitted value Southern Ry. Co., Va., franchise in Ky		$1,730,090.02

Reversed

FIGURES, METHOD AND CALCULATION USED IN MAKING ASSESSMENT ~~IN PRESENT JUDGMENT~~ (R. 1 271-274).

YEAR ENDED DECEMBER 31, 1918, ON WHICH TAXES FOR THE YEAR 1919 WERE BASED.

Net railway operating income, Sou. Ry. Co., Va., and owned, operated, leased and controlled roads		$ 32,969,380.58
Net railway operating income, C. N. O. & T. P		3,047,946.55
		$36,017,327.13
Capitalized at 7%		$514,533,244.71
DEDUCT: Total outside excess tangible values, *i. e.*, shops, terminals and double tracks of Sou. Ry. Co., Va., and owned, operated, leased and controlled roads	$80,160,065.06	
Total outside excess tangible values, *i. e.*, shops, terminals, and double tracks of C. N. O. & T. P	2,046,735.53	
		$82,206,800.59
DEDUCT total tangible outside values, we have		$432,326,444.12
Entire mileage Sou. Ry. Co., Va., and owned, operated, leased and controlled roads	9,601.83	
Entire mileage C. N. O. & T. P	337.27	
	9,939.10	
Ky. mileage Sou. Ry. Co., Ky., M. & O., Cumberland R. R., and Cumberland Ry	227.11	
Ky. mileage C. N. O. & T. P	197.50	
	424.61	
Proportion Ky. to total mileage 4.273%—4.273% of $432,326,444.12 gives total value in Ky		$18,473,308.96
Equalized at 85%		$15,702,312.62
Values heretofore paid on tangible and intangible property in Ky. by Sou. Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry	$3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky. by C. N. O. & T. P	9,173,208.00	
		$12,673,720.00
Omitted value Southern Ry. Co., Va., franchise in Ky		$3,028,592.62

Present

FIGURES, METHOD AND CALCULATION USED IN MAKING ASSESSMENT ~~THAT WAS REVERSED IN 274 U. S. 76~~ 1

(STIPULATION R. ——). 280-284)

YEAR ENDED JUNE 30, 1917, ON WHICH TAXES FOR THE YEAR 1918 WERE BASED.

Net railway operating income, Sou. Ry. Co., Va., and owned, operated, leased and controlled roads		$ 31,806,408.49
Net railway operating income, C. N. O. & T. P		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
DEDUCT: Total outside excess tangible values, *i. e.*, shops, terminals and double tracks, of Sou. Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
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Ky. mileage C. N. O. & T. P	197.50	
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Values heretofore paid on tangible and intangible property in Ky., by C. N. O. & T. P	9,181,368.00	
		$12,681,421.00
Omitted value Southern Ry. Co., Va., franchise in Ky		$1,730,090.02

FIGURES, METHOD AND CALCULATION USED IN MAKING ASSESSMENT IN PRESENT JUDGMENT (STIPULATION R. ——). 280-284)

YEAR ENDED DECEMBER 31, 1918, ON WHICH TAXES FOR THE YEAR 1919 WERE BASED.

Net railway operating income, Sou. Ry. Co., Va., and owned, operated, leased and controlled roads		$ 32,969,380.58
Net railway operating income, C. N. O. & T. P.		3,047,946.55
		$36,017,327.13
Capitalized at 7%		$514,533,244.71
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Ky. mileage C. N. O. & T. P.	197.50	
	424.61	
Proportion Ky. to total mileage 4.273%—4.273% of $432,326,444.12 gives total value in Ky.		$18,473,308.96
Equalized at 85%		$15,702,312.62
Values heretofore paid on tangible and intangible property in Ky. by Sou. Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky. by C. N. O. & T. P.	9,173,208.00	
		$12,673,720.00
Omitted value Southern Ry. Co., Va., franchise in Ky.		$3,028,592.62

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Supreme Court of the United States

OCTOBER TERM, _______.

Nos. 300 and 301.

SOUTHERN RAILWAY COMPANY, - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, BY, ETC., - *Appellee.*

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, - - - - - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, BY, ETC., - *Appellee.*

REPLY BRIEF FOR APPELLANT.

L. E. JEFFRIES,
S. R. PRINCE,
EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Louisville, Kentucky,
Counsel for Appellants.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, ______.

Nos. 300 and 301.

SOUTHERN RAILWAY COMPANY, - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, BY, ETC., - *Appellee.*

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, - - - - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, BY, ETC., - *Appellee.*

REPLY BRIEF FOR APPELLANT.

We ask the indulgence of the Court to a short reply brief.

1.

Appellee's brief is a second petition for rehearing. The first petition for rehearing was denied immediately following the opinion reported in 274 U. S. 76.

Appellee's argument, as in the first petition for rehearing, is that the additional franchise assessment is not against the 127.63 miles of the Southern Railway Company in Kentucky, but is against such mileage plus the 197.50 miles of the Cincinnati, New Orleans and Texas Pacific Railway Company. This argument is clearly erroneous, as was held by this Court on the former appeal.

The suit is to assess the value of the alleged omitted franchise or intangible property in Kentucky of the Virginia corporation. No other railroad is a defendant. It is not claimed that any other railroad had an additional franchise value.

In 193 Ky. 474, the Kentucky Court of Appeals held that because the Virginia corporation owned all of the stock of the separate Southern Railway Company in Kentucky, and because of other peculiar unifying facts, that, for franchise tax purposes, the Southern Railway Company in Kentucky ceased to be a separate entity, and that it was in law the Virginia corporation.

In other words, for the purpose of this suit, the Court wiped out the Southern Railway Company in Kentucky, and held that its 127.63 miles was but a division of the Virginia corporation, and that franchise taxes should be assessed on that basis.

Therefore, the entire purpose of the case was, and is, to fix the added intangible property value, if any, that adhered in these 127.63 miles because it was but a division of the Virginia corporation instead of a separate entity.

It was stipulated that each separate railroad in Kentucky referred to in pleadings or exhibits, to-wit, the Southern Railway Company in Kentucky, the Cumberland Railroad Company, the Cumberland Railway Company, the Mobile and Ohio Railroad Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company, had made full reports and paid the full tax assessed on their respective tangible and intangible property (Stipulation 16, R. 101; Stipulation 2, R. 183).

The C. N. O. & T. P. is not, has never been held to be, and cannot be held to be the Virginia corporation. The C. N. O. & T. P. is an entirely separate entity. The Virginia corporation does not even own a majority of its capital stock. The Virginia corporation merely controls it in the following indirect manner:

A majority of the voting stock of the C. N. O. & T. P. is owned by the Southwestern Construction Company. Since 1917, the stock of the Southwestern Construction Company owned by the Alabama Great Southern plus the stock of the Southwestern Construction Company owned by the Virginia corporation has constituted a majority of the stock of the Southwestern Construction Company. The Virginia corporation owns a majority of the stock of the Alabama Great Southern (R. 38, 90).

That the above does not mean that the Virginia corporation itself owns a majority of the stock of the C. N. O. & T. P. is a plain arithmetical proposition.

Under the Kentucky Statutes, the value of the franchise of an interstate carrier is determined, as stated by this Court on the first appeal (274 U. S. 76-78):

> "Where the railroad (in this case the defendant Virginia corporation with its 127.63 miles in Kentucky) is partly within and partly without the State, the value of the intangible property so to be taxed may be determined substantially as follows: capitalize the net railway operating income of the entire system for the accounting year last ended; assign to Kentucky its mileage proportion of that amount; deduct the assessed value of the tangible property otherwise taxed; and the remainder is the value taken as the basis for the franchise taxes. * * *"

While it is true that in assessing the value of the franchise of the particular railroad, mileage, income, etc., of owned, operated, leased and controlled roads is used, nevertheless the franchise value so found is the franchise value of the particular road to be assessed—in this case the 127.63 miles of the Kentucky corporation. We are not assessing the franchise value of the separate C. N. O. & T. P. That road has already paid its own taxes. Its figures are properly used in ascertaining the value of the Virginia corporation because it is one of the large number of owned, operated, leased or controlled roads. The resultant figure, according to the statute, and according to this Court's interpretation of the statute, is the franchise or intangible property value of the defendant Virginia corporation and of that corporation alone. Therefore, the resultant figure, whatever it may be, is assignable only to the mileage of the road to be assessed, *i. e.*, the Virginia corporation with its 127.63 miles in Kentucky.

It was erroneous, therefore, for the State Circuit Court and for the Kentucky Court of Appeals to spread the alleged additional intangible value of the defendant corporation over the mileage of the C. N. O. & T. P. Timely objection to this method of spreading the valuation was made in both the Circuit Court and in the Court of Appeals.

2.

On page 4 of appellee's brief, the statement is made that there was a mistake in the record in that an amended petition was not filed prior to the previous appeal to this Court. We have never heard of any such amended petition. It will be noted when appellee filed its petition for rehearing, after the first opinion in this case, that no claim was then made of any such mistake in the pleadings.

3.

At numerous places in appellee's brief, the statement is made that the assessment should have been approximately half a million dollars more. This statement is based on the alleged claim that all figures with reference to the Cumberland Railroad, Cumberland Railway, and Mobile and Ohio Railroad should have been excluded from the calculation.

As a matter of fact, appellee stipulated on November 2, 1928, after the first opinion of this Court that:

"2. During all of the times involved herein, the defendant, Southern Railway Company, owned a majority of the stock of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company.

* * * * * * *

"5. During each of the years in question, the assessing authorities of the State of Kentucky—the State Tax Commission—uniformly, systematically and intentionally assessed the franchise tax of all common carriers having lines within and without the State of Kentucky upon the following basis, to-wit:

"The carrier's railway system was deemed to include the lines owned, operated, leased or controlled by it, and wherever the carrier owned a majority of the capital stock of another carrier, such ownership of stock was deemed to constitute the second carrier as being owned by the first; that the net railway operating income of the carrier and of the lines owned, operated, leased and controlled by it—taxes, hire of equipment and joint facility rents being deducted—was capitalized at 7%; that there was then deducted the total excess values outside of the State of Kentucky of the carrier proposed to be assessed, and of the lines owned, operated, leased or controlled by it; there was then assigned to Kentucky the proportion that the number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky bore to the total number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky and elsewhere. * * *." (R. 270, 275.)

It would plainly have been unconstitutional for the Court, in the instant case, to have assessed the defendant on a basis different from that employed uniformly, systematically and intentionally in assessing value of all other common carriers.

Greene, *et al.*, v. Louis. & Interurban R. Co., 244 U. S. 499.

Counsel concedes that the basis adopted by the Court in including the figures of these three controlled roads was proper.

> "To avoid all confusion on this subject, we moved the Court to omit these lines (Cumberland Railroad, Cumberland Railway, and Mobile and Ohio Railroad) in making the assessment, and the appellant objected, for to omit them would be to increase the assessment. We took no cross-appeal from the judgment, believing that the Court was right. * * *" (Appellee's brief, p. 6.)

As a matter of fact, we did not object because the assessment would have been higher. Our objection was pleaded in our answer to the effect that an assessment based on a different calculation than that uniformly applied would be unconstitutional (R. 243, 255).

> "The defendants, and each of them, say that to assess a franchise tax on a basis which omits from all calculations the earnings, the mileage, excess values, and other figures of the said three common carriers, which during the years involved were owned by the defendant, Southern Railway Company, would be a violation of the Constitution of the State of Kentucky, and a violation of the Con-

> stitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof."

After stating that no cross-appeal was taken because the calculation of the Court was correct, it is startling to find that counsel thereafter claims in the brief that the assessment was too low.

4.

Appellee states:

> "This appeal offers a new case to this Court. The pleadings are new. The evidence is new, for additional facts were stipulated on the return of the Woodford Circuit Court. * * *" (Appellee's Brief, p. 8.)

It would be easy to go through the pleadings and stipulation and demonstrate that there is nothing new in the present record, except that the amendment was filed "for the purpose of making a claim for taxes against (or in respect of) the line of the Cincinnati, New Orleans and Texas Pacific."

The case is the same now as on the first appeal, *i. e.*, an attempt to fix an alleged additional value on the 127.63 miles of the Virginia corporation in Kentucky.

5.

Appellee states in its brief:

> "Some part of the capital operating the system must be apportioned to the Kentucky lines.

> What that part should be was a question to be determined by the circuit court. Its decision as to the amount was not only acquiesced in, but on appeal to the Court of Appeals was expressly conceded to be correct. * * *" (Appellee's Brief, p. 22.)

As a matter of fact, the amount of the judgment presently appealed from was most vigorously attacked in the Court of Appeals and was not acquiesced in.

The only explanation of the above erroneous statement is that the entire paragraph from which it is taken is copied bodily from appellee's brief in this Court on the first appeal. The concluding paragraph on page 14, all of pages 15, 16, 17, 18, 19, 20, 21, 22, and all but the last paragraph of page 23 of appellee's brief are likewise verbatim copies from appellee's brief in this Court on the first appeal.

6.

On pages 36 and 37, appellee copies the calculation and method used in arriving at the present judgment. Examination will show that figures and method of calculation are identical with the figures and method of calculation which we gave the Court in our reply brief on the first appeal at pages 20 and 21, and which, as Justice Brandeis points out, were at that time attacked by the Commonwealth as not being correct.

> "The figures adopted by this Court are presented only in the brief of the plaintiff in error. They are protested by counsel for the Commonwealth." (274 U. S. 76-91.)

7.

In the appendix to the brief for appellee (pp. 50, 51, 52 and 53) there are given certain alleged "corrected figures." These figures exclude all figures of the Cumberland Railroad, the Cumberland Railway, and the Mobile and Ohio Railroad, the three controlled roads which counsel concede on page 6 of their brief should have been included.

We submit, as in our original brief, that the judgment of the State Court should be reversed.

Respectfully submitted,

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Charles W. Milner,
Counsel for Appellants.

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CHARLES E

Nos. 300 - 301

Supreme Court of the United States

OCTOBER TERM 1931

SOUTHERN RAILWAY COMPANY, ... Appellant,
versus
COMMONWEALTH OF KENTUCKY, by, &c., . Appellee.

ANDREW W. MELLON, Director General
of Railroads, ... Appellant,
versus
COMMONWEALTH OF KENTUCKY, by, &c., . Appellee.

BRIEF FOR APPELLEE

✓

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Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, ... *Appellant,*
v.
COMMONWEALTH OF KENTUCKY, EX REL. ETC., *Appellees,*
AND
ANDREW MELLON, DIRECTOR GENERAL OF RAILROADS, ... *Appellant,*
v.
COMMONWEALTH OF KENTUCKY, EX REL. ETC., *Appellee.*

BRIEF FOR APPELLEE

By Section 4077 Kentucky Statutes every railroad company and every other like company exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service shall annually pay a tax on its franchise. By Sections 4078-4087 where the lines of the company lie in Kentucky and elsewhere, the entire net earnings are ascertained and the value of the franchise is fixed and that proportion of this valuation is apportioned to Kentucky as the proportion that the length of the lines in Kentucky bears to the total length of the lines of the company. The statute has been upheld by the Court of Appeals of Kentucky, and on appeal by this court. The franchise tax is a tax on the intangible property of the corporation. Henderson Bridge Co. v. Kentucky, 99 Ky. 623, 166 U. S. 150; L. & N. R. R. Co. v. Greene, 244 U. S. 545; Illinois Central R. Co. v. Greene, 244 U S. 555. In providing for a mileage basis in fixing the value in Kentucky, the statute followed the rule often approved by this court. State railway tax cases, 92 U. S. 608; Western Union v. Mass., 125 U. S. 520; Pittsburg R. Co. v. Backus, 154 U. S. 521; Adams Express Co. v. Ohio, 165 U. S. 194.

By Section 4241 Kentucky Statutes a judicial proceeding is provided for the assessment of property omitted from assessment. This proceeding was instituted pursuant thereto to list for assessment the Southern Railway Company, which had made no report to the Kentucky authorities as required by the statute and had concealed from them the fact that it was doing business in Kentucky and operating in other names its property in the state. Two actions were filed; one (R 1) including the years 1914, 1915, and 1916, the other the years 1917 and 1918 (R. 57). During the first three years the Southern Railway Co. did not own and operate the Cincinnati Southern Railway. During the last two years it did own and operate this long and valuable line in Kentucky, (R. 182). The actions were heard together. Judgment was entered in the lower court in favor of the defendant (R. 94), and on appeal was reversed by the Kentucky Court of Appeals, see Commonwealth, By Etc. v. Southern Railway Co., 193 Ky. 474. (R. 150.) On the return of the case to the lower court judgment was entered in favor of the plaintiff (R. 184), and on appeal the judgment in this case was affirmed by the Kentucky Court of Appeals, although the judgment in the other case heard with it for the taxes of the years 1914, 1915, and 1916 was reversed; and that was the end of that case. See Southern Railway Co v. Commonwealth of Kentucky, 204 Ky. 388 (R. 194) The railway company appealed from the judgment in this case to this court and it was reversed, Southern Railway Co. v. Kentucky, 274 U. S. 76. On the return of the case to the lower court, additional pleadings were filed and the issues being made up (R. 236) and the case submitted, judgment was entered in favor of the plaintiff in the same amount as in the former judgment. (R. 278-287.) On appeal from that judgment to the Kentucky Court of Appeals it was affirmed, see Southern Railway Co. v. Commonwealth, 238 Ky. 638. (R. 290.) The railway company prosecutes this appeal from that judgment. We can not better state the case as now presented than it is stated in the opinion of the Court of Appeals, and especial attention is asked thereto, as a part hereof. (R. 290.)

The case as now presented to this court comes simply to this: Shall appellant be taxed as all other taxpayers? Or shall it be adjudged without right an exemption from taxation? The taxes against all other railroads in the state have been assessed exactly as the taxes of appellant have been assessed by the judgment herein. All others have paid their taxes. If the judgment herein is not enforced, appellant will simply obtain an exemption from taxation to which it is not entitled. It was not taxed as other railroads simply because it concealed the facts from the state authorities. If this plan of operating owned lines in other names and concealing the truth obtains an exemption from taxation here, the door is opened for countless frauds on the state. We ask the careful attention of the court to this.

The main contention here is that the matter is concluded by the opinion of this court on the former appeal. But this court did not then adjudge the case which is now presented. The record that went to this court was a copy of the record in the Kentucky court, which is before you on this appeal. That record only showed in the judgment the amount of taxes assessed. It did not show how this amount was reached or upon what basis it rested. The figures upon which the result was reached were not in the record. The petition upon which the recovery was had only set up the ownership of the line from Louisville to Danville, and the case was argued before this court on the basis that the assessment was only rested on this little line and was confiscatory. That the court may clearly see this we call attention to appellant's brief in this court on that appeal on which the opinion of this court was written.

This court, not having in the record the figures showing how the assessment was made and looking to the pleadings for the issues before the court, thought that the assessment was too large, but this conclusion was due to the condition of the record. The fact is there was a mistake in the record. Our amended petition, was by some mistake never filed or made part of the record and we did not observe this when the case was in the Kentucky court, as no question was then raised on the subject.

This court did not mean to adjudge appellant an exemption from taxation or to adjudge that it might not be taxed just as all other railroad companies are taxed. It did not have enough before it to show that this had been done and it rested its conclusion entirely on what was then before it. A very different case is presented by the record as it now stands. This court will have no difficulty in affirming the judgment as the facts are before it and it sees that appellant is taxed just as all other like corporations; for it has affirmed the judgments of this kind in the following cases in which the facts as to the calculation of the assessments in such cases are fully set out: Henderson Bridge Co. v. Kentucky, 166 U. S. 150; Adams Express Co. v. Kentucky, 166 U. S. 171; L. & N. R. Co. v. Greene, 244 U. S. 522; I. C. R. Co. v. Greene, 244 U. S. 555.

In Mutual Life Ins. Co. v. Hill, 193 U. S. 557, the rule as to the effect of former appeals is thus stated:

> "While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded, even though all are not specifically referred to in the opinion, yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what question may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

Again in Messenger v. Anderson, 225 U. S. 436, the rule is thus stated:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. King v. West Virginia, 216 U. S. 92, 54 L. Ed. 396, 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co. 198 U. S. 95, 99, 100, 49 L. Ed. 959, 25 Sup. Ct. Rep. 577; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 343, 40 L. ed. 991, 993, 16 Sup. Ct. Rep. 850. Of course this court at least, is free when the case comes here."

The opinion of this court on the former appeal rests in the end on these statements in the opinion:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accord-

> ance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto. The Mobile and Ohio, the Cumberland Railroad, and the Cumberland Railway were held not to be a part of the system. . . . . The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway Company in Kentucky of $13,555 per mile for 1918 and $23,730 for 1919."

The judgment on this appeal rests on the ground that there is a claim for taxes in respect of the Cincinnati line. This is the most valuable line in the system. The fact that it was not owned and operated by appellant in the years 1914, 1915, and 1916, was the reason that the action to recover the taxes ~~for~~ these years was dismissed, for without this line the other lines in Kentucky were not connected with the Southern Railway Company System. For this reason too in the first opinion the court of appeals, 193 Ky. 474, it was held that the Mobile and Ohio, the Cumberland Railroad and Cumberland Railway could not be considered, because as the case was then presented these were disconnected lines. But this contention was never made after it was shown that appellant owned and operated the Cincinnati-Southern. The court knows that a line from St. Louis to Mobile must cross a line from Cincinnati to New Orleans. To avoid all confusion on this subject we moved the court to omit these lines in making the assessment and the appellant objected, for to omit them would be to increase the assessment. We took no cross-appeal from the judgment, believing that the court was right as the Court of Appeals opinion, on the first appeal, should be confined to the facts then before the court. Certainly appellant can not complain that it obtained the lower assessment which it then claimed was all it was liable for in any event.

The figures given in the second quotation above made from the opinion are obtained by dividing the amount of the assessment by 127.65, the length of the line from Danville to Louisville, Kentucky. Not so here, the assessment is based on 424.64 miles of railroad in the state and is only about one-third as much per mile as the assessment the court there held excessive. To say that the judgment of this court holding an assessment of 127 miles excessive is conclusive that a like assessment of 424 miles at the same amount is excessive is simply without reason.

This court on the former appeal only held that there being no claim for taxes in respect of the Cincinnati line, the assessment simply rested on the line known as the "Southern Railway in Kentucky," 127 miles long and was an excessive assessment on this line. The figures given in the opinion show this. The holding that the assessment made on this basis was excessive is not a holding that no assessment could be made on a proper basis. The opinion on the former appeal only reversed the judgment for further proceedings. The record then before the court did not show how the result was reached. Not so now. Every fact necessary for the calculation of the amount is stipulated in the new record (R. 270). Taking the figures so stipulated it is no trouble to follow the statute which is fully set out, explained and upheld by this court in L. & N. R. Co. v. Green, 244 U. S. 522.

The facts of this litigation can thus be summarized:

1920. Suit filed in the county court of Woodford County, Kentucky, seeking to assess for taxation an omitted portion of the intangible property of the Southern Railway Company of Virginia, and alleging that the

Southern System was doing business in Kentucky, but had filed no report.

1921. First opinion of the Court of Appeals (p. 150), 193 Ky. 474, 237 S. W. 11; holding that the Southern System was in fact doing business in Kentucky and liable for taxation on a system basis, when the amount due had been determined.

1924. Second opinion of the Court of Appeals (p. 194), 204 Ky. 388, 264 S. W. 850; dismissing and reversing an assessment for 1914 and 1916 for lack of a physical connection, but affirming without discussion the assessment for 1918 and 1919.

1927. Opinion of this court, 274 U. S. 76, 71 L. Ed. 934, holding that the Southern System was doing business in Kentucky; that there was no claim for taxes on the part of that system operated under the name of the C., N. O. & T. P., and that the amounts assessed were arbitrary and excessive.

1930. Third opinion of the Court of Appeals (p. 290), 238 Ky. 638, 38 S. W. (2d) 696; affirming the assessment, after an amended statement had been filed making claim against the Southern System as operated in Kentucky and including specifically that portion of the system operated under the name of the C., N. O. & T. P.

This appeal offers a new case to this court. The pleadings are new. The evidence is new, for additional facts were stipulated on the return of the Woodford Circuit Court. The amounts assessed for each year, 1917 and 1918, are the same as on the prior appeal to this court. But the case is not the same and appellant is estopped to so maintain; for on the former appeal it maintained that the assessment then before the court was an assessment on only 127 miles of railroad and nothing more. This appeal reduces itself to a single question:

> "IT BEING ADMITTED THAT THE SOUTHERN SYSTEM WAS DOING BUSINESS IN KENTUCKY, FOR THE YEARS IN QUESTION, IS THAT SYSTEM LIABLE FOR TAXATION LIKE OTHER CARRIERS IN THE STATE?"

On the first appeal to this court there was no statement or pleading which made any claim for taxes on account of the operation of the C., N. O. & T. P. in Kentucky by the Southern System. So that there really was no claim for taxes on that division of the system. On the return of the case to the Woodford Circuit Court an amended statement was filed in which this claim was set up. Thereupon additional stipulations were filed and with this additional matter in the record appears another case. The pleading is not the same, nor is the evidence the same. The new pleading appears in the printed record on pp. 236-242, and the additional stipulations on pp. 270-277.

We have read with care the elaborate brief filed for appellant. It stands admitted that appellant during the years in question was doing business in Kentucky. It stands admitted that under the decisions of this court, and of the Kentucky Court of Appeals it was liable to the tax in question just as other corporations doing like business in Kentucky. It stands admitted that appellant was not taxed because it concealed the facts from the Kentucky taxing authorities. It stands admitted that all other corporations doing like business in Kentucky have been taxed just as appellant's taxes have been fixed in the judgment and that they have paid their taxes. If the judgment appealed from does not stand, appellant will simply obtain an exemption from taxation to which it was not entitled; for under the Constitution of

Kentucky the burden of the public taxes must fall on all like taxpayers equally. Certainly the opinion on the former appeal leads to no such result. "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." Mutual Life Ins. Co. v. Hill, 193 U. S. 554; Chas. Wolf Packing House v. Court of, Etc., 267 U. S. 552.

The questions discussed and decided on the former appeal were that the assessment then before the court was an assessment on the 127 miles of railroad, known as the Louisville Southern and that the amounts fixed amounting to so many dollars a mile on this line was excessive. These are the only questions determined in that opinion. Certainly it can not be deduced from that opinion that appellant can not be assessed just as all other like taxpayers. That opinion rests on the ground, as therein expressly stated: "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific." The case now presented rests expressly on this claim. The decision then made that the assessment was excessive because resting on only 127 miles of railroad is not a decision that a like assessment on more than three times as many miles of railroad is excessive. Appellant now insists that the facts being stipulated, it was not material that the facts were not pleaded and that so there was then a claim for taxes in respect of the Cincinnati lines. But this is to assail the opinion not to follow it. The opinion holds that there was no claim for taxes in respect of these lines and its conclusion that the assessment was an assessment on only the Louisville Southern line of 127 miles and so was excessive rests on this holding. When it so held, it decided all that was before it. Anything further said in the opinion as to these lines or a claim of taxes in respect thereof was on a matter not then before the court; for as the court expressly held no claim for taxes in respect of the Cincinnati lines was then presented. The figures given in the opinion, no less than its words, permit no other conclusion. While the assessment now before the court is in the identical figures as the assessment then before the court it rests on 424.65 miles of railroad in Kentucky and not on 127 miles, which the court then held the assessment then before it rested on. There was no showing then how the "identical figures" were obtained or how all other like corporations were assessed. Now it is shown how the "identical figures" were obtained, and that all other like corporations were assessed in the same way. (R. 270-275.) The judgment rests on pleadings and facts not then before the court.

The appellants can not complain that the Mobile & Ohio and the Cumberland Railway lines were not included in the assessment under the original stipulations. There had been included the mileage, the earnings and some outside tangible values of these lines; and if the lines themselves came out of the case it was of course necessary to remove from the totals all earnings and all mileage and all valuations of the M. & O. and the two Cumberlands. The old figures which were used on the first appeal to this court were:

1917 SOUTHERN RAILWAY SYSTEM

Inclusive of the Mobile & Ohio and the Cumberlands.

Total mileage of system	10,098.53 (p. 262)
Total earnings of system	$36,776,734.50
Kentucky Mileage	424.64 or 4.209 per cent.

But leaving out these lines the figures for this case become:

1917 SOUTHERN RAILWAY SYSTEM

Exclusive of the Mobile & Ohio and the Cumberlands.

Total mileage of system	8,914.22 (p. 286)
Total earnings of system	$33,673,556.09
Kentucky mileage	363.28 miles or 4.075%

The second year, 1918, the figures are almost identical and appear on the same pages of the printed record. On this basis the Southern System was operating the following mileage in the borders of Kentucky:

Southern in Kentucky, Main line	127.62 miles
Southern in Kentucky, Trackage	38.16 "
C., N. O. & T. P.	197.50 "
Total	363.28 miles.

And as the total system mileage was 8,914.53 miles, the proportion in Kentucky must be 4.075%. It is also necessary on this basis to correct the net operating railway income by taking out the earnings of the Mobile & Ohio and the two Cumberland lines, and also necessary to subtract the excess tangible valuations of the Mobile & Ohio for its foreign terminals, double tracks, etc.

The true Southern System was doing business in several states, including Kentucky, and in Kentucky had seen fit to do business under two names: (1) Southern in Kentucky, (2) C., N. O. & T. P. The system-unit operated, owned and controlled this Kentucky mileage within the meaning of the Kentucky statute. It is further stipulated that all of the whole system, including this Kentucky mileage, is a unit of operation. The separation of accounting may be used by the Southern System for its own purposes, but a system of accounting can not change the law with reference to the right of the state to levy taxes on a unit operation of railway lines.

The stipulations set out fully the usual method used in the computation of such taxes (p. 271). Including the M. & O. and the two Cumberlands, the figures work out for each year:

Omitted Valuation	1917	$1,730,090.02	(p. 271)
	1918	3,028,592.62	(p. 272)

But EXCLUDING the M. & O. and the two Cumberlands (which is this case), they become:

Omitted Valuations	1917	$1,482,243	(p. 286)
	1918	3,755,034	(p. 287)

All this was presented to the judge of the Woodford Circuit Court, and his reasoning is summed up in the following, the defendants objecting to the assessment being made on the other basis:

> "On the whole record the lines in Kentucky as a whole made large net earnings and were fairly representative of the system for the years in question, and that therefore under the statute the mileage basis should be applied." (P. 279.)

Thus on the whole case that court found that the mileage valuations within Kentucky were not substantially less than the system mileage valuations, and this being the case an assessment on a system-unit basis becomes proper. Excluding these lines the omitted valuation would be:

1917	$1,482,243	
1918	3,755,277	See Exhibit X pp. 286-287
Total for two years	$5,237,277	

Including these lines the omitted valuation is:

1917	$1,730,090.02
1918	3,028,592.62
	4,798,682.64

These are the same figures which were before this court on the first opinion. But it will be noted that the sum of the judgment is some half million dollars LESS than if these lines had been excluded. When the case came on for trial in the appellate court we took no cross appeal, and since the system-unit is not injured by the result of the judgment appellant will not be heard to complain of the figures. Compare Judge Logan's opinion (p. 290 at 310-311), 238 Ky. 637, 658. For the amount of taxes payable under the judgment is a less amount than the system would have to pay under the figures set out in our Exhibit X. (R. 286-7.)

It has always been recognized that trackage rights come under the same rule as operated mileage: See Jefferson v. Board, 25 Law R. 1637, 78 S. W. 443. And as we understand this use of trackage rights has been so universal that it is now conceded by all taxpayers and of course must apply to this case. It is earnestly submitted that this court overlooked the trackage rights of 38.16 miles in its former opinion, and possibly in some way got the figure mixed with the Kentucky, Mobile & Ohio mileage, which was 38.63 miles (p. 48).

Appellant was certainly doing business in Kentucky in the years 1917 and 1918. There is this stipulation as to the Cincinnati line:

> "Effective January 1917, the executive and other officers of the defendant, Southern Railway Company, became the corresponding officers of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since January 1917, there has been unification and consolidation for supervision of operation of the said Cincinnati, New Orleans & Texas Pacific Railway Company into the Southern Railway system. Since January 1917, the cars and engines of the Cincinnati, New Orleans & Texas Pacific Railway Company have been marked 'Southern,' and at all of the stations of the Cincin-

> nati, New Orleans & Texas Pacific Railway Company, the bulletin boards had on them 'Southern Railway System,' and on the caps and uniforms of the conductors there was the word 'Southern.'" (R. 182.)

In addition to this the reports made by the corporation to its stockholders are filed (R. 134-147) and the accompanying maps. On these maps the Southern Railway is printed in red, the Cincinnati Southern in blue, stock controlled roads operated under separate management in green and these words are printed on the margin:

Red
Blue

Southern Railway.
Cincinnati, New Orleans & Texas Pacific Ry.
Alabama Great Southern Railroad
New Orleans and Northwestern Railroad
Harriman & Northeastern Railroad
Northern Alabama Railway

Southern Railway System

When the executive and other officers of the Southern became the corresponding officers of the Cincinnati-Southern, plainly the former was merged in the latter. All the money received went into its treasury and was disbursed by its officers. If it was not operating this line, it was not operating any; for all its lines were controlled by the same officers.

In addition to this is the following allegation in the defendant's answer: (R. 177.)

> "That in January 1917, the defendant, Southern Railway Company, controlled the Alabama Great Southern Railroad Company through ownership of a majority of its capital stock; that in January, 1917, the defendant Southern Railway Company and the Alabama Great Southern Railroad Company acquired a majority of the capital stock

so that the defendant Southern Railway Company could and did control through stock ownership the Cincinnati, New Orleans and Texas Pacific Railway Company from January, 1917, to the present time."

This line was therefore a stock controlled road during the years in question, not operated under its separate management but by the management of the Southern. So it is printed in blue on the maps and included in the Southern System.

These facts bring the case within the rule often laid down by this court in like cases.

> "Identity of interest could not be clearer or closer than it was between the defendants in the two cases, they represented precisely the same, single interest, and the Hart Company and Wood, as agents of the Elyria Company, were obviously and necessarily privies to the judgment rendered in its favor in the circuit court of appeals for the sixth circuit. Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294."
>
> "While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being but a part of the latter, acting merely as its agent, and subject in all things to its proper direction and control." Southern R. Co. v. Lowe, 247 U. S. 330.
>
> "The management and control of all the operations of the Eastern Company have always been kept in charge of a 'managing committee' of two members, one of whom for many years before the evidence was taken was the general manager of the Omaha Company and the other the general superintendent of the Milwaukee Company. The Eastern Company did not pay either of these men any salary for their services.
>
> "The auditor of the Omaha Company has been the auditor of the Eastern Company, which paid no part of his salary, and the established practice

has long been for the one bookkeeper of the Eastern Company to take his journal and ledger to the auditor of the Omaha Company monthly for verification.

"Seven of the nine directors of the Eastern Company at the time the evidence was taken were officers either of the Milwaukee or Omaha Company; the eighth, the attorney of the Eastern, had desk room in the Milwaukee Company's legal department, of which he had recently been a member; and the ninth director, the president, was not an employee of either, of the two owning companies.

"With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that because it is technically a separate legal entity the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public." Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Assoc., 247 U. S. 484.

"The petitioner did not itself do the business of its subsidiaries and have possession of their property, as in Southern P. Co. v. Lowe, 247 U. S. 330, 62 L. Ed. 1142, 38 Sup. Ct. Rep. 540, but the principle of that case must be taken to cover this." Gulf Oil Corporation v. Lewellyn, 248 U. S. 71.

"We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the 16th Amendment and income tax laws enacted thereunder." United States v. Phellis, 257 U. S. 156.

"Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company." Davis, Agent, v. Alexander, 269 U. S. 114.

> "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires." Adams Express Co. v. Ohio, 166 U. S. 225.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, and other like cases have no application for those cases involved only formal matters and the court there pointed out that a different rule applies in cases 'concerning substantial rights.' In Philadelphia, Etc., R. Co. v. McKibbin, 243 U. S. 264, only a question of process served on the president of the corporation while passing through the state, was involved. This is made plain by the court's opening statement.

Certainly if a liability for tort or the taxes due the United States can not be defeated by corporate forms, the taxes due the states can not be so defeated; and there is much stronger reason for so applying the rule than in the case of a former judgment against the subsidiary or for a tort committed by it.

As to the Louisville-Southern the admitted facts are these:

1. The Virginia corporation bought the property and paid for it. (R. 102.) 2. The system has full authority to and does route over the Kentucky line to destination both freight and passengers. (R. 97). 3. The officers, from president to general counsel, are the same men. (R. 83-4.) 4. The Kentucky line has bought no new rolling stock since 1894; but the parent system has maintained the then existing rolling stock at the same

amount without cost to the Kentucky line. (R. 95.) 5. All money collected by the Kentucky line was paid into the system's treasury; and by said system disbursed. (R. 103.) 6. From and after January, 1917, the Southern Railway System in its own name, owned and was doing business in the state of Kentucky over the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company and as such owned and was operating 197.5 miles of line into which the Southern Railway in Kentucky terminated. (R. 177, 182.) After February, 1917, the whole line was marked at stations and bulletin boards "Southern Railway System." (R. 182.)

In its report to its stockholders "Miles of road, June 30, 1917, owned" are these words: (R. 137.)

Louisville, Kentucky, to Cincinnati Southern, Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60

In its report for 1918 under the "Miles of road owned" are these words: (R. 143.)

Louisville, Kentucky, to Cincinnati Southern, Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60

How could any court without shutting its eyes to the truth doubt that these two lines were in 1917 and 1918, owned and operated as part of "the Southern System?"

The Cincinnati line connecting with its other lines gives it a through line from the whole south to Cincinnati and all the cities north of it. The Louisville line connecting with the Cincinnati lines at Danville, Kentucky, gives it a through line from the whole South to Louisville, Indianapolis, St. Louis and other western cities. The present Constitution of Kentucky took effect September 28, 1891. By section 171, it provided that "taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." The statute levying this franchise tax reading just as it now reads took effect November 11, 1892. The Louisville line was sold under the court's decree on August 16, 1894, and was bought by the Southern Railway Company, which then organized the Southern Railway Company in Kentucky to evade the statute passed about two years before. The statute was upheld by the Court of Appeals sustaining an assessment for 1893 and the judgment was affirmed here, Henderson Bridge Co. v. Kentucky, 99 Ky. 625, 166 U. S. 150. Southern R. Co. in Ky. v. Coulter, 113 Ky. 657, involved the taxes for 1896. The statute has since been uniformly enforced. Under it all railroad systems whose lines are in part in Kentucky, such as the Illinois Central, the Chesapeake & Ohio and the Louisville & Nashville, pay the tax after fruitless appeals to this court. Is there any reason why the Southern Railway system should be exempt from the burden all other systems bear? It enjoys every right they enjoy and accomplish just what they accomplish by reason of through lines and the long haul. These corporations took the Kentucky lines and operated them in their own names. If the Southern had done the same thing, would anyone believe that this controversy would ever have arisen? If not, the only question presented is, can it by a mere corporate form defeat the statute or while really owning and operating these lines can it by mere name in which it acts escape a tax which it would pay if it did these things in its own name? The question is an important one, not only to Kentucky but to nearly every state; for nearly all the states have now similar statutes and it will be easy for every railroad system to do just what this one has done and operate its lines in each state in a different name, and they will do it and so escape franchise taxes in the states where the lines are operated, if this court sustains this appeal. We can not believe that this court will sustain such a patent evasion, and enunciate a rule that would unsettle and destroy all it has written on the subject in the last fifty years.

The exhaustive opinion of the Court of Appeals on the first appeal is printed in the record (pp. 150), and we ask the special attention of this court to it without repeating here the reasons given for the judgment. It is earnestly submitted that to hold otherwise would have been for that court to shut its eyes to the truth and ignore the entire current of authority on the subject.

THE TAX IS ONLY ON PROPERTY IN KENTUCKY

In addition to its tangible property a large railroad system must have a large capital sufficient to operate it. This capital, as this court has often held, is distributed along its lines and is subject to taxation in the states where the lines are operated. There was no taxation here of any property not within Kentucky. The assessment was made just as it would have been made if the corporation had operated the Kentucky lines in its own name and it is written large on the record, that if it had so operated the Kentucky lines, this case would not be here.

> "The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole; and each part of the road contributes, not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and con-

> nected operation of the whole. This is no denial of the mathematical proposition that the whole is eual to the sum of all its parts; because there is a value created by and resulting from the combined operation of all its parts as one continuous line.
>
> "Now, when a road runs into two states, each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes, what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road." Cleveland, C., C. & St. L. R. Co., v. Backus, 154 U. S. 444.

Plainly as the corporation was operating two lines in Kentucky it was liable to some franchise tax in Kentucky, and there is no showing even now that the amount fixed is excessive. It is entirely immaterial whether the Louisville line made money or didn't make it, counting merely the receipts on that line. It brought to the corporation the business to and from the south, to and from Louisville, Indianapolis, St. Louis and other western cities. Its real value to the corporation was as a feeder. It makes the line appear as operated at a loss, by bookkeeping, charging up to it equipment supplied and the like (R. 95-96) but the system is the thing. The line is a part of the system. Some part of the capital operating the system must be apportioned to the Kentucky lines. What that part should be was a question to be determined by the circuit court. Its decision as to the amount was not only acquisced in but on appeal to the Court of Appeals was expressly conceded to be correct. The Kentucky Statute does not provide that the mileage shall control in making the assessment. It only provides that it shall be considered. In the absence of any complaint in the state courts on this subject it must certainly be presumed here that the state courts acted properly and that the assessment is fair.

The Kentucky Statute includes in the system lines "operated, owned, leased, or controlled." It is held that lines held by stock control are included, L. & N. R. Co. v. Greene, 244 U. S. 522. In this case the corporation both operated and controlled the Cincinnati and Louisville lines. Such lines out of Kentucky were counted by this court in the above case to lower the proportion of the lines in Kentucky to the whole lines. If they may be so counted, they must be in like manner counted when they swell the proportion in Kentucky.

There is no showing here that any property not within the state was included in the assessment. In Delaware, Etc., R. Co. v. Pennsylvania, 198 U. S. 341, it was shown that the corporation owned coal of the value of $1,700,000.00 which was necessarily included in its capital stock upon which the tax was charged. It does not appear here that any property outside of Kentucky was included in the valuation. For all that the record shows every dollar of such property was deducted, as it should have been. This is the distinctive feature of the case, Louisville, Etc., Ferry Co. v. Kentucky, 188 U. S. 385. The fact that property having its situs in Indiana was included in the assessment, appeared in the record. The same is true of Wallace v. Hines, 253 U. S. 66; it did appear that the bonds and land grant having a situs in another state were included in the assessment. In Union Transfer Line v. Wright, 249 U. S. 275, it appeared that more cars under the statute were assessed than were in fact in the state, as shown by express stipulations.

The contention that the assessment is unwarranted and is a taxation of property not in this state is wholly without foundation in the record. The only substantial ground attempted to be made out is the showing that the line from Louisville to Danville and its branches known as the Southern in Kentucky, lost money; but there was never a railroad system in which some of its branches did not lose money, and there is no attempt to show that the lines in Kentucky as a whole lost money or that they were not equal to the average of the system in profits. In fact the Cincinnati Southern is the most profitable line of the system. (See R. 177.) If anything was lost on the Southern in Kentucky it was more than made up in Kentucky. Therefore, appellant made no attempt to show that the Kentucky lines as a whole fell down. The burden was on it to show this to make out any ground for relief on this ground; for the tax is based on all the Kentucky lines. Not only so, this line connects the system with Louisville, Indianapolis, St. Louis and the West. See maps on stockholders reports. It thus brings business to the system for long hauls and its value is not determined alone by the cash taken in on it.

"Through passenger trains were run from St. Louis, Missouri, to Danville, Kentucky, but no further." (R. 175.)

Back of all this the claim that this line lost money rests alone upon appellants' bookkeeping. As you will see from the stockholders reports (R. 148, F, G, H, & I), there was a charging in 1917 against this line for hire of freight cars, debit balance $431,246.00, also joint facility rents, $153,697, and these two items alone about equal the alleged shortage.

Now how did this come about? The line was originally known as the Louisville Southern Railway. Being a short line it had only a few engines or cars. It failed and was bought by the Southern. Then to dodge Kentucky taxes it did not operate the line in its own name, but organized the Southern in Kentucky and these facts are stipulated: (R. 95.)

> "When the Southern Railway Company in Kentucky acquired the property of the Louisville South-

ern Railway Company in 1894, it also acquired the following equipment, viz.:

Steam locomotives	25
Box cars	609
Flat cars	47
Stock cars	70
Caboose cars	12
All classes of freight cars	738
(Fol. 145) Coaches	15
Combination passenger cars	3
Baggage and express cars	5
All classes of passenger cars	23
Derrick cars	1
Other company service cars	7
All classes of company service cars	8
All classes of cars in service	769

"Since that time above named equipment has been used by the Southern Railway Company in Kentucky in common exchange with the defendant, Southern Railway Company of Virginia, that is, portions of the equipment above named have been used by the Southern Railway in Kentucky, and portions of the Southern Railway Company of Virginia outside of Kentucky, but where any of this equipment is used by the Southern Railway Company of Virginia, such use by the Southern Railway Company of Virginia, was without charge to that company, in connection of that company's furnishings to the Southern Railway Company in Kentucky a like number of engines or cars without charge to the Southern Railway in Kentucky.

"When any of the above equipment has become out of repair or unfit for service, it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway in Kentucky; so that for every period of time from 1894 (Fol. 146) up to and including the present time, the Southern Railway in Kentucky owns the same number of locomotives, freight and passenger cars, etc., that it did in 1894 and has reported each year and tax paid each year on the same description and value of equipment as on hand September 17, 1894.

"Southern Railway Company in Kentucky has bought no equipment since 1894. Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in stipulation 2, it is leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of other various railroad companies, and has done this under the usual traffic arrangement obtaining among railroads, and for such use of equipment has paid to the defendants, Southern Railway Company of Virginia, and other railroads, the regular charges for such hire of equipment." (R. 96.)

Of course this line can not with the little equipment it had do the business of the Southern System with Louisville and the West. So the Southern furnishes the cars and engines at the rates usual between railroads. These rates are fixed very high to bring equipment home. Otherwise much would be kept indefinitely. We all know this. It is a matter of common knowledge that no railroad company could live on any such basis. The joint facility rents are not paid for this line. They are paid for the system.

The defense is on a par with all the other conduct of appellant. It started out to dodge Kentucky taxation. For this reason it made this dummy corporation. (R. 102-3.) For this reason it ran the Cincinnati line in the name of the Cincinnati, New Orleans and Texas Pacific until we uncovered the pretense in this suit. For this reason it maintained on the first appeal that the Mobile and Ohio did not connect with its system. For this reason it left a little gap in the City of Louisville, which it claimed not to own so that its line to the West did not connect with the Southern in Kentucky. For this reason it framed its contract and kept its books with the Southern in Kentucky so as to make a showing of no profits but a loss, when the fact is there is not another short line in Kentucky doing as much business and appellant has not another short line so necessary to the system as this line.

There was never in all the history of this court a more cold-blooded, persistent and groundless attempt to evade Kentucky taxation justly due. The defense has not a foot to rest upon in the facts.

THE ASSESSMENT AS MADE IS VALID

The whole record, and the four opinions seem to us to establish the following:

1. The Southern System is doing business in Kentucky.

Commonwealth v. Southern Ry., 193 Ky. 474, 237 S. W. 11 (p. 150).

Southern Railway v. Com., 204 Ky. 388, 264 S. W. 850 (p. 194).

Southern Railway v. Kentucky, 274 U. S. 76, 71 L. Ed. 934.

Southern Railway v. Com., 238 Ky. 638, 38 S. W. (2d) 696 (p. 290).

2. The said system failed to report its unit operation to the Kentucky taxing authorities; but did report the operations of the controlled lines as separate units.

3. The names under which the system operations were reported to the state taxing authorities are:

a. C., N. O. & T. P.
b. Southern Railway in Kentucky.

4. An assessment made in the ordinary way, just as other similar railroads are assessed in Kentucky, shows that the system unit of the Southern has not paid

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taxes in Kentucky on an average valuation using the whole system-unit as a basis.

5. This difference in assessed valuations, must be omitted intangible system property omitted from Kentucky taxation, and here taxable: unless the result is so arbitrary and unreasonable as to tax property outside the state.

It is to this last point—confiscatory taxation—that we want to direct the court's attention. The Southern System keeps a very extended set of books, and figures each road, line and division for its own results (p. 148a, etc.). By reason of this method of keeping books, we were able to produce in court full figures showing the income and expenses of each little section of the system-unit, including the operations with this state, under the two names used. However it is freely admitted that traffic moves as a unit over a unit system; and the special accounts are kept largely for the company's convenience; and all the funds go into a common treasury.

The earnings of each separate ledger, when summed together show that the annual earnings of this system-unit is about

$3,600 per mile (p. 262-263)

This is the average of each of the ten thousand miles, including the operations within this state.

The operations within Kentucky runs as follows:

Earnings, 1917		
C., N. O. & T. P.	$14,763.93	
Sou. in Ky.	878.19	
	$15,642.02	(pp. 261, 262)
Earnings, 1918		
C., N. O. & T. P.	$9,037.11	
Sou. in Ky. (loss)	4,742.13	(pp. 262, 263)
	$4,294.98	

It is earnestly submitted that these figures have a positive meaning here. For the system earnings run evenly for the two years, and show a net variation of less than $25 per mile. The earnings on the Kentucky mileage varies greatly, moving from fifteen thousand to four thousand in the two years. And this seems to us to illustrate the propriety and justice of making an assessment on the system-unit basis; because a large unit is subject to less violent fluctuations from year to year as business conditions in a single state may be different for local reasons alone.

As we see it, this same system-unit admittedly doing business in Kentucky, has kept its books on two of its unit-operated and indivisible divisions showing that one of these fingers is making more money per mile than the system and that the other finger is making less money per mile than the system. But these two fingers are the UNIT itself within the State, and when the system is in Kentucky it must be subject to like rules of taxation as are also other carriers. Besides system-unit taxation necessarily produces uniformity; well illustrated by the earnings of the Kentucky sections of the system: which earnings run for 1917 some five times that of the system per mile; and for 1918 run some 30% greater than the system mile.

The state has pleaded in this record by amended statement and there makes a claim for taxes due from the whole system-unit, including this C., N. O. & T. P. finger: a division which is obviously profitable not to say prosperous. The names used on the books of the system are merely terms for its convenience in accounting; and a method of several accounting can have no bearing on computation of taxes under a general law. For this taxing statute applies to all corporations performing a public service: and the method of figuring out the amount due—which method is used as we have just outlined—is that used in all other cases, e. g., the Illinois Central, Louisville & Nashville, Chesapeake & Ohio, etc. The Southern Railway System must come under the same general statute; and where that statute is applied, as here, is treated in just the same manner. Any other method of computation is objectionable as a special concession (be that concession up or down) to one taxpayer, which other like taxpayers do not receive. The result which we are asking is only uniformity of taxation, nothing more.

The system unit of taxation has been so often approved by this court that we will not repeat the authority or the reasoning. But we do think that it is not common sense or good business to operate the fingers of the same hand into earning units, for tax purposes. For it is the whole hand that produces the result. And it does not become the thump to demand special consideration over the middle finger; or the little finger over the wrist.

Therefore the Southern System, being in Kentucky for purposes of operation, must also be in Kentucky for purposes of taxation as other railroad taxpayers. Whether called the C., N. O. & T. P. or the Southern in Kentucky, or other name or names: the system is doing business in Kentucky, it is a single functioning unit; and comes under the same law as other systems. Under that law, the state is not permitted but is required to lump together the system's earnings both earnings collected within and without the state. In treating the earnings within Kentucky it must also use the total Kentucky earnings without reference to which ledger, may be used to enter those monies collected.

Such a diverse system of books could be carried to a most remarkable conclusion. Railroad accounting would forget all unity. A general breakup of the system for taxation would come immediately. Every little branch, or "dummy line" would be a several loss: for many such small feeders are run at a loss. Every terminal would show the creation of a number of new taxing divisions, each keeping its own figures; and some of which would show one result of profit per mile and others a result of losses per mile. In this was uniformity and unity of taxation would be lost.

On the other hand, the system-unit is the basis of the operation and management; and is sensibly used for taxation purposes. So here, when we add these two Kentucky fingers of the Southern System together, a remarkable result appears. And under this result, can be found the fundamental cause of the operation of the Southern-in-Ky. division. For when we add them together, the total Kentucky operations, per mile, are really more profitable than those of the entire system-unit. So that instead of the operations of the system within the bounds of Kentucky, being a losing venture and thereby taking from system earnings, and bringing outside earnings into Kentucky: the Kentucky mileage pays best. For the returns from the operations of the system in its operated mileage in Kentucky exceed the average mileage earnings of the whole unit for each of the two years. The result then must be very different: instead of bringing into Kentucky earnings from other states, the result is to equalize over the whole system, the large earnings which the system actually took in within the boundaries of this state. On such a showing Kentucky might have a right to make some actual reduction in the large terminal and double tracks values which were deducted as lying in other states ($62,868,941). But we have not asked for this, and believe that simple justice has been done when all the railroads of the state are assessed alike on a system basis.

To ask any special additional assessment because of the extra-profitable mileage of the System-within-Kentucky, would complicate this record; and destroy the uniformity of assessment and taxation on which we have tried to base this whole proceeding. The present assessment merely gives to Kentucky, an average mileage valuation for the whole of the Southern System: allows for outside excess tangible valuation: adds nothing because the Kentucky mileage is on the whole much more prosperous than the system mileage. The very figures show that the assessment of the Kentucky operations of the system in the name of the two fingers of the whole is much less than its true valuation: less than the Kentucky earnings warrant, and less than the system earnings warrant.

It is earnestly submitted that intangible property has thereby been omitted from assessment; and that this omission came about because the system did not make the report required by law; and that the state is now entitled to assess the portion of property omitted.

Some years ago, a local attorney for a carrier made an interesting argument before the Kentucky Railroad Commission—he claimed that a tunnel ought not to be assessed as having any value whatever, that it was a liability, and not an asset, as it cost a great deal to build, and cost something to maintain; and further that no tunnel had ever been known to bring in a penny of revenue. And all of this was correct; yet the tunnel was taxed as having a tangible value because without it the railroad could not operate.

Equally interesting arguments might be advanced about certain bridges, long mileage lines between large cities, and some depots where revenues are small. Following this out, a railroad system would become (for purposes of taxation) only a few bright spots in which tariffs were collected. Yet such is not the case, for the value of the unit depends on its connections and the places in which business may begin or in which deliveries may be made over a widely varied area.

Therefore when the Southern System has come into Kentucky, and does business in Kentucky, the system operation is in the state. Now while the system comes in for operation under its own rules, it must come in for taxation like other common carriers and corporations performing a public service. It must have its tax schedule figured like all similar tax payers. The Southern System is operating in Kentucky. And whether it operates in Kentucky under one, two or three names; or by other accounting, the result for taxation must be the same. It must be taxed on a unit basis—not on a quarter sawed basis—and especially not on a quarter-sawing of its own making. So when the system-unit enters Kentucky to operate as it did when it took over the C. N. O. & T. P. by stock ownership, it became liable for unit assessment in Kentucky like other railways; unless the result is so arbitrary and excessive as to be confiscatory.

This appeal shows that the system mileage lying within the boundaries of Kentucky is worth more per mile and earns more per mile than the ten thousand miles of which it is a part. So the result is that a uniform method of assessment averaging the valuation of earnings throughout the entire Southern System in fact lets out of Kentucky, excess values earned therein: and necessarily cannot bring into Kentucky earnings collected from parts of the system.

It is our earnest contention that under the new pleading and the additional evidence; that the assessment is modest—not arbitrary: that it is for a smaller amount by a half million dollars than we are actually entitled: and instead of being excessive, it is smaller than the earnings might indicate. Instead of bringing into Kentucky, values which have been earned outside, the judgment actually spreads Kentucky earned monies over the system-unit and takes values earned in Kentucky to the system's help. Besides it is submitted that such an assessment is more than proper because it is made on exactly the SAME basis as other taxpayers performing a public service.

That the parent corporation may be taxed on the property held for it by subsidiary corporations is well settled. Hart Steel Co. v. R. Supply Co., 244 U. S. 294; Southern Pacific Co. v. Lowe, 247 U. S. 330; Chicago Etc., R. Co. v. Minn. Assoc., 247 U. S. 490; Gulf Oil Co. v. Lewellyn, 248 U. S. 71; U. S. v. Phillis, 257 U. S. 156, and see especially Commonwealth v. Southern R. Co., 193 Ky. 479-488.

Appellant concealed the truth from the board and went before the state board and obtained an inadequate assessment of the line running from Cincinnati to the South. If the true facts had been disclosed to the board a very different assessment might have been made. That the assessment was wholly inadequate is shown by the facts which are now presented. When appellant is credited on the assessment now made by the amount of that assessment, it has received all that it can justly claim and no injustice will be done. This is necessarily the proper rule, for otherwise the state would have no remedy where the truth was fraudulently concealed and partial assessments made of subsidiary corporations when the thing really to be assessed was the parent corporation. Equity regards that as done which ought to be done and looks past the nominal parties to the real parties to the substance and essence of things. Seymour v. Springs, Etc., Assoc., 144 N. Y. 333; Hitchman Coal Co. v. Mitchell, 245 U. S. 299.

Stress is placed on the fact that the assessment now before the court is in the same amount as the assessment heretofore before this court. But as shown by that opinion the assessment was then held confiscatory on the ground that it was an assessment only of the 127 miles of road between Louisville and Danville. The assessment now before the court, while in the same amount, is an assessment of all the roads in Kentucky, or 424.64 miles of road.

(The assessment was properly made against appellant and no injustice was done.) The assessments are in these words:

YEAR ENDED JUNE 30, 1917, ON WHICH TAXES FOR THE YEAR 1918 WERE BASED.

Net railway operating income, Southern Ry. Co., Va., and owned, operated, leased and controlled roads		$31,806,408.49
Net railway operating income C., N. O. & T. P.		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
DEDUCT: Total outside excess tangible values, i. e. shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
Total outside excess tangible values, i. e. shops, terminals, and double tracks C., N. O. & T. P.	1,019,582.15	
		68,851,913.86
DEDUCT: Total tangible outside values, we have		$456,530,007.57
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,761.36	
Entire mileage, C., N. O. & T. P.	337.27	
	$10,098.63	
Ky. mileage, Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.14	
Ky. mileage C., N. O. & T. P.	197.50	
	$424.64	
Proportion Ky. to total mileage 4.209%—4.209% of $456,530,007.57, gives total value in Ky.		19,215,348.02
Eqalized at 75%		14,411,511.02
Values heretofore paid on tangible and intangible property in Ky. by Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,053.00	
Values heretofore paid on tangible and intangible property in Ky. by C., N. O. & T. P.	9,181,368.00	
		$12,681,421.00
Omitted value Sou. Ry. Co., Va., franchise in Kentucky		$1,730,090.02

YEAR ENDED DECEMBER 31, 1918, ON WHICH TAXES FOR THE YEAR 1919 WERE BASED.

Net railway operating income Southern Ry. Co., Va., and owned, operated, leased and controlled roads		$32,969,380.58
Net railway operating income C., N. O. & T. P.		3,047,946.55
		$36,017,327.13
Capitalized at 7%		514,533,244.71
DEDUCT: Total outside excess tangible values, i. e. shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated; leased and controlled roads	$80,160,065.06	
Total outside excess tangible values, i. e. shops terminals and double tracks of C., N. O. & T. P.	2,046,735.53	
		$82,206,800.59
DEDUCT: Total tangible outside values, we have		$432,326,444.12
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,601.83	
Entire mileage C., N. O. & T. P.	337.27	
	9,939.10	
Ky. mileage Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Railway	227.11	
Ky. mileage C., N. O. & T. P.	197.50	
	424.61	
Proportion Ky. to total mileage, 4.273%—2.273% of $432,326,444.12		18,473,308.96
Equalized at 85%		15,702,312.62
Values heretofore paid on tangible and intangible property in Ky., by Southern Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky., by C., N. O. & T. P.	9,173,208.00	
		12,673,720.00
Omitted value Southern Ry. Co., Va., franchise in Kentucky		$3,028,592.62

There has been no complaint that the assessment was not made just as all other like assessments and no error of fact was pointed out in the lower court. The errors referred to in the opinion of the Court of Appeals making the amount for one year too large and for the other year too small are due to clerical errors in copying figures; but this made the amount due less than it should be and appellant was not prejudiced. Such clerical errors may be corrected in Kentucky courts on motion, but no motion to correct has been made. Without this such an error can not be considered on appeal. Com. v. Caudill, 121 Ky. 537; Dodd v. Combs, 3 Met. 29.

4. THERE HAS NEVER BEEN ANY COMPLAINT THAT THE ASSESSMENT WAS NOT PROPERLY MADE.

It is the same as that before the Court of Appeals on the second appeal and no complaint of it was then made. The court expressly held "it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by the former opinion," Southern R. Co. v. Com., 204 Ky. 390. There was no complaint of this holding and no objection on this ground was urged when the case was next before the Court of Appeals. The former opinion simply adjudged that an assessment be made but did not fix any amounts. The reason the assessment for 1918 is so much larger than for 1917 is fully explained in the record. The assessments were made on a different basis. The facts are stipulated as follows:

> **"5. Former stipulation No. 19 is erroneous. But it is true that for the year 1917 the property of all railroads in the State of Kentucky was equalized at 75% and for 1918 85%." (R. 183.)**

During the war property values of all kinds went up. So it was that property was equalized at 75% in 1917 and at 85% in 1918. This was the rule in all assessments. When the gross value of appellant's intangible property was equalized at 85% and the deductions remained practically the same, plainly a much larger remainder was left than would have been left on a gross valuation of 10% less. All other corporations were taxed in the same way and appellants can not complain that it was taxed just as other taxpayers.

By sections 4021 and 4023, Kentucky Statutes, which are printed at the back of this brief, it is provided that the state shall have a lien on the property assessed for the taxes due thereon, and that the holder of the legal title, the holder of the equitable title, the claimant or bailee in possession of the property shall be liable for the taxes thereon, but as between themselves it shall be the duty of the holder of the equitable to list the property and pay the taxes thereon. The assessment here was directed to be made (R. 278). The liability was then fixed, no assessment may be made until that jugdment is carried into effect. At that time federal control had terminated and the property was in the possession of the railway company. It was its property and in its possession. The state had a lien on the property for the taxes so directed to be assessed and the claimant in possession or equitable owner is liable for the taxes. Here the real owner was in possession when the judgment was entered. The state could not enforce its lien upon the property unless the railway company was a party to the suit, it was therefore proper that the railway company should be made a party to the suit and the judgment against it was proper, for otherwise the state could have looked to nobody for its taxes but the Director-General and he simply represents the United States government, which cannot be sued, except by its consent. Congress may repeal the Federal Control Act tomorrow and leave the state without any remedy but for its lien on the property and its right to collect from the person in possession when the assessment is made. Section 15 of the Federal Control Act provides:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds."

As the Federal Control Act did not repeal, impair or affect the existing laws or powers of the states in relation to taxation, the Kentucky Statutes were not affected thereby. The provision as to the payment of the taxes from railway operation is only a provision for a mode of payment; when the taxes are not so paid under the express letter of section 15 the taxes may be enforced just as they would be if there had been no federal control. The cases cited for the plaintiff in error on this subject are in no wise in point. They were not tax claims arising two years after federal control ceased. The very purpose of section 15 was that the states might collect their taxes as before and should not be required to look alone to the federal government for them. Otherwise the state government might be unable to exist, for it could not enforce payment by the federal government. As we see it this is a question turning simply on the proper construction of the state statutes, which were expressly left unaffected by the Federal Control Act, and being only a question of the construction of the statutes given by the highest state court.

Appellant insists that its "Southern in Kentucky" line is 127 miles long. This is the length of its main line, but it has trackage rights bringing the total to 165 miles. It insists that its total mileage is 8,914.22. Plainly the mileage in Kentucky and the total mileage must be counted on the same basis. If trackage rights are counted to make the total mileage they must be counted in the Kentucky mileage. The 8,914.22 total mileage includes 564.06 miles of trackage rights (R. 71 & 87), of which 38.9 are in Kentucky (R. 101). The proportion would not be seriously affected if trackage rights are left out, in and out of Kentucky; but plainly appellant can not count them out of Kentucky and not in Kentucky, as it has insisted on doing in this court and in the United States Supreme Court, which did not have before it the stipulations and pleadings since filed.

The 20% penalty was properly adjudged. While the 20% is called a penalty in the statute, it is provided that 15% goes to the officer prosecuting the proceeding for his services and only 5% goes into the treasury. The same provision is made in the judgment appealed from (R. 278). The cost of the collection must be borne either by the state or by the taxpayer. It is only just that he should pay this cost, rather than the other taxpayers of the state. To this extent the 20% though called a penalty is simply a provision for costs. The remaining 5% goes into the treasury and is the only interest the state receives on its delayed taxes. In Missouri Pacific v. Ault, U. S. 554, interest at 6% per annum on the amount found due was allowed against the Director General from July 29, 1918, until paid. In this case all the interest charged for a greater delay is 5%. This is certainly not punishment. It is only compensation for the delay in payment and is less than one year's interest. In fact the 20% is less than the interest allowed in the Missouri-Pacific case for the delay. To call this punishment is to trifle with words. The penalties held not enforceable in the Ault case are thus defined.

"But double damages, penalties and forfeitures which do not merely compensate but punish, are not within the purview of the statute." The Owens case, 256 U. S. 225, is to the same effect.

The 20% here simply compensates the officer for his services and the state for the interest it has had to pay on the state warrants. The fact is the state is not made whole. In the Ault case, Ault got his $50.00 with legal interests. He was only denied $390.00 as a penalty in addition to this. The penalty was practically seven times the amount of his claim. That was plainly punishment, but not so is a provision for payment of costs and 5% for delay in paying taxes.

> "It is the legal duty of every person liable for taxes to pay the same when due, and the power of the state to impose on the taxpayer penalties for non-compliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, can not be doubted. And if the state is compelled to resort to legal proceedings for the collection of its taxes it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case." 26 R. C. L. p. 386, Sec. 344.

To deprive the officer of compensation in these proceedings is to nullify the statute authorizing such proceedings, for certainly officers will not so act without pay. They are liable for costs if unsuccessful. Plainly the statute does not mean that the state shall be without remedy in this class of cases.

Federal control began on 27th day of December, 1917, and ended on the 1st day of March, 1920.

This is a mere assessment proceeding. It was proper to make the railroad company and the Director General defendants that both might be heard. The judgment properly made the assessment against both. This was for the protection of the company. Their rights as between themselves may be settled when their accounts are settled.

The whole spirit and purpose of the control act in relation to taxation was to provide against any conflict with the existing laws or powers of the state. The state may collect its taxes and the reasonable costs of collection are a part of the tax, so is interest on taxes delayed in payment. The allowance of 20% in cases like this was provided for by the state laws for this reason. The Federal Control Act in providing that it should not affect, amend, repeal or impair the tax laws of the state necessarily leaves unaffected the taxes and the rights of the state incidental to their non-payment, such as the right to cost and interest for the delay. The Federal Act was aimed at the removal of such things only as interfered with its designated purposes. The taxation of this property was provided for under the laws of the state that then existed and those laws also provided for the payment of the costs and compensation for the delay. Under no stretch of the imagination can it be contended that taxation of railroad property impeded the movement of troops or material. Therefore the Federal Control Act has no bearing whatever on this case. Especially is this true since the assessment here was made long after Federal control ceased. These assessments do not bear interest in Kentucky.

To sustain this point is to hold that the cost of the delayed assessment must be borne by the other taxpayers of the state and not by the property taxed, and that no allowance may be made to the state for interest on the taxes, the payment of which has been delayed.

Appellants insist that the fault here was that of the director general and that under the statute there is no liability for the 20% penalty. But this is to overlook the nature of the case. The director general did not take possession until December 31, 1917. The basis of the action is the failure of the corporation to report as required by Sec. 4070, Kentucky Statutes. If the corporation had not concealed the facts the action would not have been brought. By the statute the reports were required to be filed between the 15th day of September and the 1st of October. The reports for 1917 were to be made in September, 1917, or long before the director general was appointed; so he had nothing to do with this report, but only the corporation. The corporation should have made a report in 1918, but failed to do so. When the director general came in he had no means of knowing the secret facts which the company had not disclosed, and it was still its duty to make the report, for it was the taxpayer and knew the facts. By Section 4086 the corporation was required to pay its taxes at the same time as individuals were required to pay. By Sec. 4052, Kentucky Statutes, all property is assessed and valued as of September 15, and by Secs. 41, 43, Kentucky Statutes, all taxes are due on the first of March after the assessment.

In conclusion we submit that these things stand admitted:

1. It stands admitted that the statute is valid.
2. It stands admitted that appellant owns, operates and controls 424 miles of railroad lines in Kentucky.
3. It stands admitted that the assessment made by the lower court is made just as the statute provides and as all other assessments of railroad corporations were made.

Certainly it can not be maintained that this court decided on the former appeal that appellant may not be taxed as other like taxpayers or is conclusive of any such result. Certainly this groundless, persistent attempt to dodge taxation in Kentucky by the concealment of the facts by appellant and the ingenuity of its able counsel will not receive the approval of this court.

We earnestly submit that appellant's persistent effort to escape being taxed just as all other like taxpayers have been taxed should not be sustained by this court and that the judgment should be affirmed.

Respectfully,

J. W. Cammack,
Attorney General
L. W. Morris,
D. L. Hazelrigg,
J. P. Hobson,
for appellees.

We have also attached to this brief, the Kentucky Statutes involved, as Appendix A; and our Calculations as Appendix B.

APPENDIX A

Kentucky Statutes:

Sec. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation, or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one judisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board and shall convene the same from time to time as the business of the board may require.

Sec. 4078. In order to determine the value of the franchises mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section 4092 of this article, shall annually, between the fifteenth day of September and first day of October make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: "The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid for; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require."

Sec. 4086. All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay taxes due the State from them into the Treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

Sec. 4052. All taxable estate shall be assessed and valued as of the fifteenth of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same.

Sec. 4241. It shall be the duty of the sheriff or Auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to asessment a statement containing a description and value of the property proposed to be assessed, and the value of corporate franchise, if any., and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years after the filling of such statement, the clerk of the court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county, if not, then to his agent, attorney or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as is required by law; if not liable, he shall make an order to that effect. From so much of the order if the court deciding whether or not the property is liable to assessment, either party may appeal, as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to asessment or taxation. If the court shall decide that the property is liable to asessment, the clerk of the county court shall certify to the Auditor of Public Accounts and the sheriff a description of the property and the amount of the assessment for taxation, together with the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed, the officer filing his statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments in a book to be kept for that purpose, showing the date of the assessment, the name of the person against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment.

APPENDIX B.

THE EXACT AMOUNT OF OMITTED PROPERTY ASSESSIBLE TO THE SYSTEM UNDER THE PRESENT RECORD.

The present appeal is a new case, new in pleading, new in evidence. Running all the way through the brief, counsel for appellant keep returning to the word 'Idetical.' It is true that the amounts assessd against appellant for both years are in the same amount as in the first appeal. But these assessments are *smaller* than the amounts really omitted; and smaller than the State is entitled under the new pleading and the new evidence.

All allegations concerning the Mobile & Ohio, the Cumberland Railway, and the Cumberland Railroad were withdrawn in the amended statement (R. 238 and 241). The various figures in the record had to be corrected to meet this change; and every figure in the system total had to be modified to some extent, especially,

(1) Mileage within and without Kentucky,
(2) Earnings within and without Kentucky,
(3) Tangible valuations outside of Kentucky,
(4) Assessed valuations by the Kentucky authorities.

The corrected figures for 1917 are:

System mileage (first appeal)	10,098.53 miles	(R. 262)
System mileage (present appeal)	8,914.22	(R. 276)
System earnings (first appeal)	$36,776,734.50	(R. 262)
System earnings (present appeal)	33,673,556.09	(R. 277)
Outside valuations (first appeal)	$68,851,913.86	(R. 257)
Outside valuations (present appeal)	62,868,941.86	(R. 277)

Ky. Assessments credited (first appeal)	$12,681,421.00	(R. 281)
Ky. Assessments credited (present appeal)	11,318,440.00	(R. 286)
Ky. Percentage of mileage (first appeal)	4.209%	(R. 258)
Ky. Percentage of mileage (present appeal)	4.075%	(R. 286)

The changes for 1918 run in like amounts, and appear on the same pages of the record.

At all stages of this proceeding, counsel have been in full agreement on these figures, and have only differed as to their effect. We quote from the amended answer, filed Nov. 2, 1928:

> "That the assessment of additional taxes as proposed in the amended statement filed herein based on the exclusion of all calculations of the three railroads operated in Kentucky which were owned by the defendant, Southern Railway Company, as hereinbefore set out, to-wit, the Mobile & Ohio Railroad Company, The Cumberland Railroad Company, and the Cumberland Railway Company, would result in an additional assessment for the year 1918 of $1,462,243.08; and an additional assessment for the year 1919 of $3,755,034.85;" (R 263.)

It will be noted that these figures which are assumed in the answer of the appellant, and again appear in Exhibit X (R. 286) as the judgment to which the State claimed to be entitled. The results are

1918	Omitted valuations	$1,462,243.08
1919	Omitted valuations	3,755,034.85
		$5,21[illegible],277.93

The total of these figures exceed the judgment by half a million dollars; and therefore the figures used in the judgment are to the prejudice of the State, not to the prejudice of the appellant, provided the State is entitled to any judgment at all.

Following out the method of computation, which has always been used by the state taxing authorities, and using the corrected figures, which entirely eliminate the M. & O. and the Cumberlands from the records, we have:

YEAR ENDED JUNE 30, 1917

On which the taxes for the year 1918 were based.

Net railway operating income (Exclusive of the M. & O. and the Cumberlands)	$ 33,676,536.09
Capitalized at 7%	481,050,801.00
Deduct: Total outside excess tangibles	62,869,941.00
	$418,181,860.00

System mileage (Exclusive of M. & O., Etc.) 8,914.22 miles

Kentucky mileage:

Southern in Kentucky	127.628 miles
C., N. O. & T. P.	197.50
Trackage	38.16
	363.28 miles

Proportion to Kentucky of system mileage—4.075% and 4.075% of $418,181,860 gives a total value in Kentucky of	$17,040,910.00
Equalized at 75%	12,780,683.08
Less assessed valuations (Exclusive of M. & O., Etc.)	11,318,440.00
System valuations in Kentucky—Omitted	$1,482,243.00

YEAR ENDED JUNE 30, 1918

On which the taxes for the year 1919 were based.

Net railway operating income (Exclusive of the M. & O. and the Cumberlands)	$35,821,133.00
Capitalized at 7%	511,730,481.00
Deduct: Total outside excess tangibles	76,196,015.00
	$435,534,466.00

System mileage (Exclusive of M. & O., Etc.) 8,914.22 miles

Kentucky mileage:

Southern in Kentucky	
C., N. O. & T. P.	127.628 miles
Trackage	197.50
	38.16
	363.28 miles

Proportion to Kentucky of system mileage—4.075% and 4.075% of $435,534,466.00 gives a total value in Kentucky of	$17,726,252.00
Equalized at 85%	15,367,314.00
Less assessed valuations (Exclusive of the M. & O., Etc.)	11,312,260.00
System valuation in Kentucky—Omitted	$3,755,034.00

Now assuming that our argument is correct, we take the liberty of re-casting the figures used by this court in its first opinion; copying in the first column from the first opinion and in the second column, the figures which we think proper in this appeal.

"The amounts so arrived at were assigned to the 127.63 miles of the Southern Railway in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans & Texas Pacific. The increase per mile for 1918 was $5,334.55 and for 1919 was $9,338.34," 274 U. S., at page 80.	*The amounts so arrived at were assigned to 165.78* miles of the Southern Railway in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans & Texas Pacific. The increase per mile for 1918 was $4,080.01 and for 1919 was $10,336.47.*
"The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway in Kentucky of $13,555 per mile for 1918, and of $23,730 for 1919.	*The amount adjudged to have been omitted equals an increase on the lines of the "Southern System" of $4,080.01 per mile for 1918, and of $10,336.47 for 1919.*

**38.91 trackage (R. 101).*

The 1917 average net operating income per mile for the system was the basis for determining the Kentucky franchise taxes for 1918, and the average for 1918 controlled the amount of the 1919 taxes. The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918. The corresponding net income per mile of the Southern Railway in Kentucky for 1917 was $878. There was a loss of $4,741 per mile in 1918. The record also shows a loss in each of the years 1914, 1915 and 1916. The average for the five years was a loss of $1,230 per mile per year.

The 1917 average net operating income per mile for the system was the basis for determining the Kentucky franchise for 1918, and the average for 1918 controlled the amount for the 1919 taxes. The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918. The corresponding net income per mile of the SYSTEM operations within Kentucky for 1917, $15,642.02, and was $4,274.98 for 1918. Accounted separately there was a loss on the Southern Railway in Kentucky, which was more than compensated for, by the large system profits in Kentucky, arising from the unified operation of the system with the Cincinnati, New Orleans & Texas Pacific, and this unity of operation did not exist in 1914, 1915, or 1916.

If considered alone, the railroad of the Southern Railway in Kentucky would be a losing venture. 274 U. S. at page 82.

If considered alone, the railroad of the Southern Railway in Kentucky would be a losing venture, but when a unity of operation appears with the whole Southern System such operation cannot properly be considered alone, for the System operates as a unit and has two divisions in Kentucky.

In order to justify the increases made, there would have to be attributed to these lines large amounts from system earnings. 274 U. S. at page 83.	*In order to justify the increases made, it would **NOT** be necessary to have anything attributed to Kentucky operations from the earnings in other states, since these Kentucky operations are admittedly more profitable than the system average.*
"If intangible elements were attributed to the system at the same rate per mile as results from the distribution of the added amount to the mileage of the Southern Railway in Kentucky, their value would be more than $200,000,000 for 1919, and more than $120,000,000 for 1918. 274 U. S. at page 83."	*If intangible elements were attributed to the Kentucky mileage in proportion to their earnings, it would mean that the assessment of the Kentucky mileage might be about double an average system mile, and the State here is asking only a uniform system assessment. Clearly there is nothing arbitrary or excessive in such an entire system valuation, when the income within Kentucky greatly exceeds the system earnings per mile.*

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SUPREME COURT OF THE UNITED STATES.

Nos. 300 and 301.—October Term, 1931.

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300 Southern Railway Company, Appellant, *vs.* Commonwealth of Kentucky.	Appeals from the Court of Appeals of the State of Kentucky.
301 Andrew W. Mellon, Director General of Railroads, Appellant, *vs.* Commonwealth of Kentucky.	

[January 4, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This case involves franchise taxes imposed by Kentucky in respect of railroad lines in that State that are a part of the system of appellant, the Southern Railway Company, a Virginia corporation, and here referred to as the Southern system. A judgment of the circuit court of Woodford county affirmed in the highest court of the State, 204 Ky. 388, determined that there remained unpaid franchise taxes to be assessed on values of intangible elements amounting to $1,730,090.02 for 1918 and $3,028,592.62 for 1919. These additional values were attributed solely to 127.63 miles of railroad in that State belonging to a Kentucky corporation, the Southern Railway Company in Kentucky. The lines of the Cincinnati, New Orleans and Texas Pacific Railway Company had been held to form a part of the system, but that company paid taxes in Kentucky upon its tangible property and also franchise taxes calculated on the basis of its own net earnings. The Commonwealth originally made no claim against appellants for any taxes in respect of that company's lines. This court, 274 U. S. 76, reversed the judgment of the state court on the ground that the additional values attributed to such 127.63 miles were so excessive and arbitrary as in reality to include property outside

Kentucky and that the enforcement by that State of franchise taxes based thereon would violate the due process clause of the Fourteenth Amendment.

After receiving our opinion and mandate, the court of appeals of Kentucky remanded the case to the circuit court; and there the Commonwealth amended its petition so as to claim, in addition to its earlier demands, franchise taxes in respect of the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific. The facts were stipulated. Appellant maintained below that the proceedings were in conflict with our mandate and that to enforce the taxes claimed would be to tax property outside the Commonwealth. The court adjudged the Commonwealth entitled to recover as to the Kentucky mileage of both companies on the basis of the same values that in the former judgment had been assigned to the line of the Southern Railway Company in Kentucky alone. The court of appeals affirmed. 234 Ky. 638. This appeal is under 28 U. S. C., § 344 (a).

Our former decision merely held that the particular application of the state statute then under consideration was repugnant to the due process clause. The judgment now before us is based on a different claim. The remanding of the case by the court of appeals and the filing of an amended petition in the circuit court by the Commonwealth and the trial thereon were not inconsistent with the mandate of this court. *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553. *Wolff Packing Co.* v. *Indus. Court*, 267 U. S. 552, 562.

The additional values adjudged are based on average net earnings per mile of the system in the year preceding that for which the franchise taxes are imposed. As shown in our former opinion, net earnings of the 127.63 miles of the Southern Railway in Kentucky were very small for 1917 and there was a large deficit in 1918. But the net earnings per mile of the Cincinnati, New Orleans and Texas Pacific, having 197.5 miles in Kentucky, for both years were high when compared with the average of the system. The values on which the last mentioned company separately paid franchise taxes were excluded.

The Kentucky mileage used in the calculations included certain trackage rights and also the Kentucky lines of the Mobile & Ohio, the Cumberland Railroad and the Cumberland

Railway. The court of appeals held that the lines of these three companies were not a part of the system. 193 Ky. 474, 481. But the Commonwealth shows that, taking both years together, the additional values so arrived at are much less than if the computation had been correctly made. The error operates to the advantage of appellants. They have not shown, and but faintly claim, that when attributed to the entire system mileage in Kentucky, the additional values are so excessive or arbitrary as to amount to the inclusion of property outside the State. On this record, it cannot be said that the enforcement of franchise taxes on the basis of values established by the judgment would deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment.

The judgment requires that, in addition to the taxes levied for the two years, there shall be paid a penalty of twenty per cent on the taxes based on the omitted assessment "which shall be collected and accounted for as other taxes". § 4241. Seventy-five per cent. of the amount so added is for the compensation of officers prosecuting the action. The appellant company maintains that it is not liable for the taxes or the penalty because during 1918 and 1919 the system was in the possession and control of the Director General. And the latter says that the enforcement of the penalty against him would violate the Acts of Congress under which the railroads were taken and operated.

Neither contention can be sustained.

The opinion below shows that the property was not assessed when it should have been because of the failure of the company to report as required. It was not relieved of that duty by any Federal law. On the contrary the Act of March 21, 1918, 40 Stat. 451, after requiring every agreement for compensation to the carriers to provide that all taxes during the period of Federal control other than certain war taxes should be paid out of operating revenues, § 1, declares that nothing in the Act should be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation. § 15. Whatever may be the rights of the company as between it and the Director General, its obligations under state tax laws remain unaffected by Federal enactments.

Referring to the enforcement of the judgment, the court of appeals said (p. 661): "The State cannot compel the government of the United States to pay the taxes or the penalty, but it has a lien on the property, which should have been assessed, to secure payment of the taxes", and declared that the penalty is not one where the element of punishment predominates. Our decisions in *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 554, and *Norfolk-Southern R. R. Co.* v. *Owens,* 256 U. S. 565, cited by appellants do not apply here. The judgment, as construed by the court of appeals, is a lien upon the railroad properties in respect of which the franchise taxes are collected but does not require payment of the taxes or penalty by the Director General or the United States.

Affirmed.

Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.